Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1020

HELEN F. ROESCH,
Petitioner,

vs.

WILLIAM R. ROESCH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California, First Appellate District

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No.

HELEN F. ROESCH,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California, First Appellate District

Petitioner Helen F. Roesch respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, entered in this proceeding on July 24, 1978. Said opinion held unconstitutional the application of California's quasi-community property law at the request of a party who had moved to California and filed for dissolution of marriage, notwithstanding his spouse had consented to and requested

the application of California law, without physically taking up residence in California.

OPINIONS BELOW

The July 24, 1978 opinion of the California Court of Appeal is reported at 83 Cal.App.3d 96, and 147 Cal.Rptr. 586, and is set forth as Appendix A to the Petition. The Court of Appeal order denying without opinion the petition for rehearing is unreported and is set forth as Appendix B hereto. The California Supreme Court's order of September 27, 1978, denying a hearing to review the Court of Appeal decision is unreported and is set forth as Appendix C hereto. The judgment of the trial court, the Superior Court of the County of Alameda, is set forth as Appendix D. The findings of fact and conclusions of law of the trial court are set forth as Appendix E.

An opinion of the California Court of Appeal rendered on May 23, 1978 is unreported in the California official reports but is reported at 146 Cal.Rptr. 255 and is set forth as Appendix F of the petition. The June 22, 1978 order of the Court of Appeal granting a rehearing is unreported and is set forth as Appendix G hereto. Following this rehearing, the July 24, 1978 opinion (Appendix A) was rendered.

JURISDICTION

The judgment of the Court of Appeal was entered on July 24, 1978. A timely petition for a hearing to the Supreme Court of California was denied by order entered September 27, 1978 and this petition has been filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the United States Constitution prohibits California from applying the totality of its marital property law to a California resident who seeks to terminate his marriage in California, having moved to California from another state which has a completely different marital property system.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the United States Constitution which are involved in this case are the due process clause of the Fourteenth Amendment to the United States Constitution, the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution and the privileges and immunities laws of Article IV, section 2 of the United States Constitution. (Appendix H.)

The California statutes involved are the following parts of the California Family Law Act: Civil Code sections 4000, 4350, 4506, 4507, 4530(a), 4800, 4803. (Appendix I.)

For the convenience of the court, the pertinent portions of Civil Code sections 4800, 4506, 4530 and 4803 are set forth immediately below.

Civil Code section 4800(a).

> "Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it

expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, equally."

Civil Code section 4506.

"A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

"(1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.

"(2) Incurable insanity."

Civil Code section 4530(a).

"A judgment decreeing the dissolution of a marriage may not be entered unless one of the parties to the marriage has been a resident in this state for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition."

Civil Code section 4803.

"As used in this part, 'quasi-community property' means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

"(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property has been domiciled in this state at the time of its acquisition.

"(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so

exchanged had been domiciled in this state at the time of its acquisition."

The Pennsylvania statute involved is Title 23, Chapter 1, section 10, and Title 68, Chapter 13, section 501. (Appendix J.)

STATEMENT OF THE CASE

Introduction

The decision, of which review by this court is now sought, held unconstitutional the application by the trial court of an important portion of the California Family Law Act that defines marital property and requires it to be divided equally upon dissolution of marriage.[1] It held that a former resident of Pennsylvania, who could not get a divorce in Pennsylvania because he had insufficient grounds to do so, could move to California by himself and terminate his marriage under California's liberal Family Law Act "no-fault" dissolution law. Yet, at the same time it held that California was prohibited by the United States Constitution from applying its quasi-community property law which would have required him to share the parties' marital property equally with his wife who appeared in the action. Thus, the United States Constitution has been used to usurp and to render non-existent California's power to regulate the marital property of a resident of the state who sought the jurisdiction of a California court and application of California law to dissolve his marriage, which California applies to its other residents as a matter of course.

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[1]As discussed in "Reasons for Granting the Writ" the portions of the Family Law Act at issue are those sections defining "quasi-community property" and mandating its equal division on termination of marriage. (Civ. Code, §§ 4803 and 4800(a).)

Background—The Theory Behind Community Property and Quasi-Community Property

California is one of the eight community property states.[2] The distinctive feature of a community property state is its view of marriage as a partnership in which the spouses are equal partners regardless of the actual division of labor. Thus, the community property states consider all property acquired during marriage as the result of the work or industry of either spouse to be "community property" owned equally by both spouses.[3] The community property system recognizes a wife who does not work outside the home as an equal partner in the marriage and in the marital property even if the husband "earns" the money and "accumulates" the property in his name. This view is based on the community property states' strong public policy favoring equality and non-sex discrimination. See, e.g., *In re Marriage of Brigden,* 80 Cal.App.3d 380, 389-390, 145 Cal.Rptr. 716, 722-723 (1978); *Hughes v. Hughes,* 573 P.2d 1194, 1197-1198, 91 N.M. 399 (New. Mex. Sup. Ct. 1978). Both California spouses have interests in the marital property that are "present, existing and equal." Cal. Civ. Code, § 5105.

By contrast, Pennsylvania's common law orientation is the total antithesis. It does not recognize the wife as a helpmate and partner engaged with the husband in the common enterprise of creating a fortune as well as a family.

[2]The other community property states are Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

[3]Even in a community property state, a spouse may own non-community property called "separate" property. Generally, separate property is property acquired before marriage or by gift or inheritance after marriage. (See, e.g., Cal. Civil Code §§ 5107, 5108, 5110.)

She is not considered to own marital property equally with her husband or to have the right to one-half of it upon the termination of the marriage unless her name actually appears on the title. Penn. Stats. Title 68, Ch. 13, § 501. However, her interests are protected by the fact that Pennsylvania requires traditional fault as grounds for divorce, unlike California which dissolves marriage for irreconcilable differences. Penn. Stats. Title 23, Ch. 1, § 10; Cal. Civ. Code §§ 4506, 4507. All counsel and the trial court herein recognized that Pennsylvania and California have a completely different value system. (RT 23: 19-24; 29:7-12.)

The clash between the two systems in mobile modern day society occurs more and more frequently. Parties often acquire property in one state and terminate their marriage in another. The rights of husbands and wives to marital property upon termination of the marriage has long been a troublesome area, especially to California and the other community property states. To solve the problem in a manner consistent with California marital community property law and policy, the California legislature enacted Civil Code sections 4800 subdivision (a), 4350, 4530 and 4803 as part of its comprehensive Family Law Act in 1969, effective January 1, 1970. Civ. Code §§ 4000, *et seq.*, Cal. Stats. 1969, Ch. 1608, § 8, p. 3314.

Under this legislation, dissolution of marriage is granted without fault and the community property is divided equally. Upon such dissolution, property acquired elsewhere which would have been community property if the spouse who acquired it had been domiciled in California at the time of its acquisition is called "quasi-community

property." It is divided equally upon dissolution just like community property. This policy was adopted to apply the burdens with the benefits to non-residents who desire to submit themselves to California law.

Facts in the Present Case

Petitioner and respondent were married in Pennsylvania in 1947. (RT 2:4-6.) During the parties' 27-year marriage, respondent rose from coal mine mechanic for Jones & Laughlin Steel Corporation to Chairman of the Board and President of Jones & Laughlin. (CT 80.) While in Pennsylvania and living with petitioner during 1973, respondent negotiated and entered into a contract of employment with Kaiser Industries. (CT 110-118; RT 78:1-79:7.) On December 28, 1973, he left petitioner in Pennsylvania and came to California to be Chairman of the Board and Chief Executive Officer at Kaiser Industries pursuant to that contract. (RT 2:7-11; 3:1-6; 121:24-25.)

Mrs. Roesch planned to come to California as soon as the parties' minor son David was out of school in the summer of 1974. (RT 164:27-165:10; 165:24-27.) However, before this time, respondent told petitioner that she could not join him in California. (RT 165:10-15.)

Respondent did not have grounds for a divorce in Pennsylvania or under Pennsylvania law because of Pennsylvania's fault requirement. (Penn. Stats. Title 23, Ch. 1, § 10.) Petitioner had committed no act which would give respondent grounds for a Pennsylvania divorce. (*Ibid.*) However, after his move to California, respondent became a resident and domiciliary of California. (CT 1-2.) In order to terminate his marriage to petitioner, he therefore sought

the jurisdiction and assistance of the law of California by filing for a "no-fault" dissolution of the parties' marriage in California. (CT 1-2.)

Petitioner appeared in the California dissolution action. (CT 7-8.) She consented to its jurisdiction as to both marital status and property and requested the application of California law. Over her objection, respondent had these issues severed for trial at different times. (CT 280-289, 298-299.) He obtained the no-fault dissolution of the parties' marriage on September 19, 1975 and was remarried by the time the marital property trial was held commencing August 30, 1976. (CT 290-293, Ex. No. 1 in evidence at trial.)

As was to be expected from respondent's success during marriage, he had acquired substantial property in Pennsylvania which would have been community property if he had been domiciled in California at the time of its acquisition.

At the beginning of the trial, respondent objected to the application of California's quasi-property law on the federal constitutional grounds of due process and privileges and immunities and the constitutional issues were argued at length. (RT 16:4-44:23.) The trial court rejected respondent's constitutional arguments and divided the marital property in a manner it considered to meet the requirements of California's quasi-community property laws. (RT 44: 2-23; CT 466-473.) Respondent did not appeal from the trial court's division of the property. Petitioner

appealed from the judgment on other issues.[4] (CT 479-481.)

Although he did not appeal from the judgment, respondent replied to petitioner's appeal by contending that the court should not consider the errors she alleged in the trial court's property division because California Civil Code sections 4803 and 4800 could not constitutionally be applied to the parties' marital property at all. The Court of Appeal issued an opinion in which it agreed with respondent. (Appendix A, pp. 11-14.) It held that unless both spouses were domiciled in California before a dissolution of marriage was sought, Civil Code sections 4803 and 4800 could not be constitutionally applied to marital property. (Appendix A, p. 13.) It held that to apply California law to the parties' marital property would violate the due process clause of the Fourteenth Amendment to the United States Constitution, the privileges and immunities clause of Article IV, section 2 of the United States

[4]Although not at issue in this Petition for Writ of Certiorari, petitioner had the following complaints on appeal: (1) Respondent had made transfers of approximately $278,000 worth of property starting shortly after the parties' separation until before the trial. The trial court refused to consider this property to be quasi-community property or require respondent to reimburse petitioner for it. (2) The trial court had refused to award petitioner any of the valuable life insurance policies on respondent's life (face value of approximately one million dollars at the time of trial) or to value them at face value instead of cash surrender value. (3) The trial court refused to divide equally in kind the parties' long term tax shelter assets, but awarded them all to respondent. (4) The trial court refused to charge respondent with $45,000 for temporary spousal and child support he had paid to petitioner out of the parties' marital property rather than out of his current earnings as required by California Civil Code section 4805. (5) The trial court awarded petitioner spousal support of only 7% of respondent's monthly income of between $40,000 and $45,000. (6) The trial court conditioned child support upon visitation. (7) The trial court held that certain rights of respondent to $75,000 a year for ten years for no work whatsoever under his contract with Kaiser was his separate property under California law.

Constitution and the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution.[5] (Ibid.) The California Supreme Court denied petitioner's petition for hearing on September 27, 1978. (Appendix C.)

The result of the decision in this case is that respondent received the best of both worlds while petitioner received the worst. Respondent could not have obtained a divorce in Pennsylvania. He was able to take advantage of California's no-fault dissolution law to terminate his marriage to petitioner. Yet the United States Constitution was held to relieve him from the California Family Law Act's concomitant legislative mandate that he share the parties' marital property equally with petitioner.

REASONS FOR GRANTING THE WRIT

I. California Law Prior to the Present Decision Was Correct.

A. The Addison Decision.

As the largest of the eight community property states, California has repeatedly been faced with the problem of dividing marital property acquired by parties in other states who terminate their marriage in California. Pur-

[5]The Court of Appeal affirmed the trial court's judgment dividing the property because respondent had not appealed. (Appendix A, p. 17.) However, petitioner contended that the trial court applied California legislation in an erroneous manner and that its proper application would have resulted in her being entitled to approximately a million dollars more in property than the trial court awarded her as detailed in footnote 3. As a result of its erroneous constitutional holding, the Court of Appeal did not consider most of petitioner's contentions regarding the property division on their merits. If this Court were to grant the Writ as requested herein, the cause should be remanded to the Court of Appeal for a consideration of petitioner's contentions regarding the property issues on their merits.

suant to the 1960 study and recommendations of the California Law Revision Commission relating to "Intervivos Marital Property Rights in Property Acquired while Domiciled Elsewhere," the California Legislature enacted then Civil Code section 140.5.[6] Cal.Stats. 1961, Ch. 636, § 2, p. 1938. This section defined "quasi-community property" as all personal property and all real property in California which had been acquired by parties domiciled elsewhere which would have been community property if acquired while they were domiciled in California. It divided quasi-community property upon termination of marriage just as if it were community property. At that time, California required fault to terminate a marriage. Community property was not always divided equally. The majority of the community property could be awarded to the innocent spouse. Former Cal. Civ. Code § 146.

In *Addison v. Addison,* 62 Cal.2d 558, 399 P.2d 897, 43 Cal.Rptr. 97, 14 A.L.R.3d 404 (1965) the California Supreme Court upheld the application of former Civil Code section 140.5 to property acquired by Mr. and Mrs. Addison while they were domiciled in Illinois, a common law state. Upon his divorce in California, Mr. Addison challenged section 140.5 contending that for California to apply its community property concepts in the form of "quasi-community property" to the parties' marital property violated

[6]Former Civil Code section 140.5 was the predecessor of current Civil Code section 4803 at issue herein. (Deerings California Codes Annotated, Civil Code § 4803, Legislative History; Cal. Stats. 1969, Ch. 1608, § 8, p. 3314, operative January 1, 1970.) The problems it was enacted to solve and the early development of quasi-community property law in California are explained by Professor Herma Hill (Kay) Schrefer in the "'Quasi Community Property' in the Conflict of Laws" 50 Cal.L.Rev. 206 (1962).

the due process clause of the Fourteenth Amendment to the United States Constitution, the privileges and immunities clause of Article IV, section 2 of the United States Constitution and the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution. 62 Cal.2d at pp. 564-569, 399 P.2d at pp. 902-904, 43 Cal.Rptr. at pp. 102-104. The California Supreme Court rejected these contentions. *Ibid.*

B. The California Family Law Act.

In 1969, California revised its family law pursuant to recommendations of the Family Law Commission. It enacted a comprehensive Family Law Act Cal. Civ. Code, §§ 4000, *et seq.,* Cal. Stats. 1969, Ch. 1608, § 8, p. 3314, operative January 1, 1970. The Family Law Act repudiated the concept of fault as a basis for termination of a marriage. It eliminated the existing grounds for divorce, abolished defenses to divorce, and established two grounds for dissolution of marriage: irreconcilable differences and incurable insanity. Along with the elimination of the fault requirements for marital termination, the Family Law Act introduced a central new rule requiring the equal division of the parties' community property and quasi-community property except in certain specified unusual circumstances not relevant to the present case. Cal. Civ. Code §§ 4506, 4507, 4800, 4803. See also, 7 Witkin *Summary of Cal. Law* [8th Ed. 1974] Community Property, § 92, p. 5182; 6 Witkin *Summary of Cal. Law* [8th Ed. 1974] Husband and Wife, §§ 53, 125-126, pp. 4936-4937, 5217-5221.

As part of the Family Law Act, Civil Code section 4803 expanded the definition of "quasi-community property" to

all property acquired while the parties were domiciled elsewhere which would have been community property if acquired while they were domiciled in California, and all property acquired in exchange for this property.

C. The Court of Appeal Relied on No Authority for its Holding.

In the present case, the Court of Appeal distinguished *Addison v. Addison, supra,* by limiting it to its facts and holding that quasi-community property law cannot constitutionally be applied unless both parties move to California before seeking to dissolve their marriage. The Court of Appeal held that to apply California law in any other situation would violate the due process clause of the Fourteenth Amendment to the United States Constitution, the privileges and immunities clause of Article IV, section 2 of the United States Constitution and abridge the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution. (83 Cal.App.3d 96 at p. 107, 147 Cal.Rptr. 586 at 593; Appendix A at pp. 13-14.) In support of this holding, the Court of Appeal cited no authority whatsoever. (Appendix A, pp. 13-14.)

II. The California Court of Appeal Decision Was Not In Accord with Decisions of this Court.

A. Fourteenth Amendment Due Process Clause Decisions.

Property rights may be impaired without violating due process under many circumstances. The state's inherent sovereign power includes the so-called "police power" right to interfere with vested property rights whenever reasonably necessary for the protection of the safety, morals,

health and general well being of the people. *Ferguson v. Skrupa,* 372 U.S. 726, 729-731 (1963); *Addison v. Addison, supra,* 62 Cal.2d at pp. 566-567, 399 P.2d at p. 903, 43 Cal.Rptr. at p. 103.

The interest of California in regulating all aspects of the marital relationship including division of property upon its termination justifies application of California's quasi-community property law where both party litigants have submitted themselves to California's jurisdiction and laws as in this case. *Williams v. North Carolina,* 317 U.S. 287, 298-299 (1942). Regulation of domestic relations has long been regarded as a virtually exclusive province of the states. *Sosna v. Iowa,* 419 U.S. 393, 404-410 (1975).

B. Fourteenth Amendment Privileges and Immunities Clause Decisions.

The privileges and immunities clause of the Fourteenth Amendment to the United States Constitution affords no greater protection than the due process clause. Privileges and immunities are only those rights that belong to citizens of the United States as distinguished from citizens of a state, that is, those rights that arise from the constitution and laws of the United States as contrasted with those that spring from other sources. *Hamilton v. Regents of the University of California,* 293 U.S. 245, 261-262 (1934), *rehearing denied,* 293 U.S. 633; *Addison v. Addison, supra,* 62 Cal.2d at p. 568, 399 P.2d at p. 903, 43 Cal. Rptr. at p. 103.

The privileges and immunities clause, just like the due process clause, does not prevent government authority from placing restraints upon property of citizens necessary to

protect or preserve public morals, safety, health and welfare. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 74-75 (1873).

C. Article IV, section 2, Privileges and Immunities Clause Decisions.

The privileges and immunities clause of Article IV, section 2 of the United States Constitution has no application whatsoever to this case. This Clause has as its purpose only the prevention of discrimination by one state against citizens of another. It was not intended to give the laws of one state operation in another. *Paul v. Virginia*, 75 U.S. (12 Wall.) 168, 180 (1868).

In the present case, the party alleging discrimination by virtue of the application of California law was himself a citizen of California and therefore has no basis for complaint. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138-9 (1872). In fact, California has validly impaired so-called vested marital property rights of its own citizens. *In re Marriage of Bouquet*, 16 Cal.3d 583, 591-594, 546 P.2d 1371, 128 Cal.Rptr. 427 (1976).

III. The Present Case Has a Substantial Bearing on the Ability of All Eight Community Property States to Regulate Marital Property in Accordance With Their Public Policy.

Following California's statutory lead, Arizona enacted Title 25, section 318. This statute includes, as community property for the purposes of division upon divorce, property acquired by either spouse outside the state which would have been community property if acquired in the

state and mandates its equal division upon divorce. Laws 1973, Ch. 139, § 2; Amended 1977, Ch. 138, § 7.

The New Mexico Legislature has not yet adopted a statutory scheme similar to California Civil Code sections 4800 and 4803. However, its Supreme Court recently complimented California's quasi-community property legislation at issue herein calling it a very desirable step. *Hughes v. Hughes, supra,* 573 P.2d 1194 at p. 1201, 91 N.M. 399, at p. 406. New Mexico currently divides community property as is just and proper and permits non-community property to be divided under certain circumstances. N.M.S.A. 1953, Community Property Act of 1973 and Supp. 1975, Ch. 22, Art. 7, § 6 subdivisions A and B(1) and Ch. 57, Art. 4A, §§ 1, *et seq.*

Other community property states have handled the problem slightly differently but also in ways that would be unconstitutional if California's legislation is unconstitutional. For example, Washington and Texas divide all marital property (both community property and separate property) on dissolution in a just, equitable and fair manner. Wash. Stats. Title 26, § 26.08.110; Vernon's Texas Code Anno. 1 Family Code Act 3.63. Thus, property which would be all respondent's in Pennsylvania might be awarded all to petitioner by Washington or Texas, an even more dramatic change in property than that accomplished by application of California's quasi-community property law.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that her petition for a writ of certiorari be granted.

Dated: December 20, 1978.

Respectfully submitted,

LAWRENCE H. STOTTER
Attorney for Petitioner

Of Counsel:
VICTORIA J. DE GOFF

(Appendices Follow)

Appendices

Appendix A

Certified for Publication

In the Court of Appeal
of the
State of California

First Appellate District,
Division Four

1 Civil No. 41179

(Superior Court No. 451872-7)

In re the Marriage of William R.
and Helen F. Roesch

WILLIAM R. ROESCH,
Respondent,

vs.

HELEN F. ROESCH,
Appellant.

[Filed July 24, 1978]

OPINION

The marriage of Helen F. Roesch and William R. Roesch was dissolved by an interlocutory judgment. Wife appeals from certain portions of the judgment.

The parties were married in Brownsville, Pennsylvania, on April 17, 1947, when both were aged 21; they separated in Pittsburgh, Pennsylvania, on December 28, 1973. The parties have two children, a daughter who is of age, and a minor son, David, born April 2, 1959. Before the birth of the first child in July 1948, wife was briefly employed in an unskilled job. Since that time, however, she has been occupied exclusively as a homemaker.

Except for a brief period early in the marriage, the marital domicile was Pennsylvania, a common law state. When husband left the household he established his residence in California. Wife and the parties' son, David, have remained in Pennsylvania.

During virtually the entire period of the marriage, husband was employed by Jones & Laughlin Steel Corporation in Pittsburgh, Pennsylvania. He began as a coal miner, and gradually rose through the ranks of that corporation until on October 1, 1970, he was elected to the position of president and chief executive officer. His total gross earnings in that position were $163,000 in 1971. On January 1, 1972, husband was elected chairman of the board of directors and president at a base annual salary of $200,000.

In 1973, husband entered negotiations for employment with Kaiser Industries Corporation of Oakland, California. On November 12, 1973, prior to the separation and while he was still employed by Jones & Laughlin Steel Corporation, husband entered into an employment agreement with Kaiser. Under the terms of the agreement, husband was to assume the position of president and chief executive officer commencing January 1, 1974, for a term ending December 31, 1980, with a right of extension to May 31, 1990. The agreement set a base annual salary of $225,000 plus bonuses and other benefits.

Prior to the marriage, husband took out two policies insuring his own life. One of these policies, with a face value of $2,500, was paid up before the parties married. The other, a U.S. National Service Life Insurance policy with a face value of $10,000, was paid partly with premarital earnings and partly with postmarital earnings.

During the 27-year marriage and prior to the date of separation, four more policies were obtained, insuring husband's life. Wife had been named as a primary beneficiary in each of these policies. On October 10, 1967, husband transferred the policies to Mellon National Bank and Trust Company as trustee. Wife was named as income beneficiary of the insurance trust, with power to invade the principal. Just before the parties separated, husband amended the trust instrument to provide that upon his death the trust assets would pass into his estate to be used for certain estate purposes with the remainder to go to his children. When the parties separated the face value of the insurance trust had risen to approximately $1,000,000.

Also just before the separation, husband assigned to his daughter a portion of his vested retirement benefits from Jones & Laughlin. The effect of this assignment was to reduce from $20,179 per year to $18,000 per year the benefit husband will receive when the pension matures.

When the parties separated, husband moved his domicile to California; on January 1, 1974, he began performance of his employment agreement with Kaiser. In July 1974,

husband commenced the present action for marital dissolution in Alameda County.

There was evidence that during the marriage the parties acquired as tenants by the entireties, as provided by Pennsylvania law, the family home and its furnishings, an automobile, and certain other property.

Other assets acquired by husband during the marriage were, under Pennsylvania law, the separate property of husband. These assets included:

1. Interest in Conoco Exploration Ltd.

2. Interest in Eastgate Shopping Center at Garden City, Kansas.

3. The insurance trust held by Mellon Bank as related above.

4. Pennsylvania funds (liquid assets which, at the time of separation, totaled $275,413.86).

The trial court characterized all of the above assets as quasi-community property, and divided them between the parties as follows:

To wife:

1. The family home, valued at $80,000.

2. Household furniture, furnishings, appliances and effects in the family home, valued at $20,000.

3. Securities standing in wife's name alone and having a value of $10,700.

4. A 1971 Ford automobile, valued at $1,400.

The total value of the property awarded to wife was $114,100.

To husband:

1. All policies insuring husband's life. The cash surrender value of the policies was established to be $8,187.

2. Union Oil Drilling investment, valued at $3,000.

3. Interest in the Conoco Exploration Ltd., valued at $20,544.

4. Eastgate Shopping Center investment, valued at $19,000.

5. Remainder of the Pennsylvania funds, valued at $36,790.75.

6. Proceeds from the sale of Jones & Laughlin stock, valued at $23,650.

The total value of the property awarded to husband was $111,176.

Husband was also charged with the use of $57,124 from the so-called Pennsylvania funds to maintain the Eastgate Shopping Center investment which was awarded to him.

The inclusion of the above amount brought the total value of the quasi-community property awarded to husband to the amount of $168,300. Wife was also charged with $24,000 because of an increased tax liability of husband which resulted from her refusal to file a joint tax return with husband, as the court had ordered. The total amount charged to wife was therefore $138,100. The trial court found a net disparity in favor of husband in the amount of $30,200, and ordered that the disparity be equalized by either the payment of $30,200 from the joint stock account of the parties or shares of stock of a like value as of Sep-

tember 2, 1976, at the option of wife. The parties' joint stock account was to be used to pay attorney's fees with any residue from the account to be equally divided between the parties.

The trial court found that the unassigned portion of husband's retirement benefits from Jones & Laughlin constituted a quasi-community asset which should be divided equally between the parties when received by husband. All of the benefits which husband has or will receive under his employment agreement with Kaiser were held to constitute the fruits of his post-separation efforts, and were therefore confirmed to him as his separate property.

At trial husband stipulated, and the trial court found, that husband had the ability to pay any amount reasonably necessary for the support and maintenance of wife and the parties' minor son. Spousal support in the amount of $2,500 per month was ordered, together with $500 per month for child support; husband's obligation to pay child support was made contingent upon non-interference with his reserved visitation rights by either wire or David.

I.

Wife contends that the trial court's award of spousal support in the amount of $2,500 per month is so inadequate as to constitute an abuse of discretion. That contention cannot be sustained.

In setting the amount of spousal support, a wide discretion is vested in the trial court (*In re Marriage of Morrison* (1978) 20 Cal.3d 437, 454), "and thus an appellate court must act with cautious judicial restraint, even though the particular award might appear on appeal to be modest or

generous under the particular circumstances." (*In re Marriage of Lopez* (1974) 38 Cal.App.3d 93, 114.) A trial court has abused its discretion when, after calm and careful review of the entire record, it can fairly be said that no judge would reasonably make the same order under the same circumstances. (*In re Marriage of Lopez, supra,* 38 Cal. App.3d at p. 114; *In re Marriage of Norton* (1976) 71 Cal. App.3d 537, 541.)

Wife received the family home clear of encumbrances. In a pendente lite order, dated October 24, 1975, wife had been awarded $1,650 spousal support and $750 per month child support, for a total of $2,400 per month. Between November 1974 and November 1975, wife had accumulated from these payments savings of approximately $665 per month, for a total of $8,000. The trial court might reasonably infer that appellant experienced no difficulty in living on support payments amounting to less than that which she was awarded in the final judgment.

Wife nevertheless contends that the award is inadequate in view of particular circumstances of the case. She urges that the trial court ignored several crucial factors: husband's ability to pay; the duration of the marriage; the unlikelihood of employment for wife in view of her age; experience and education; the disparity of the award of income-producing assets favoring husband; the comparative financial positions of the parties before and after dissolution. But wife requested that she be awarded the high value, non-income-producing assets and there was evidence that her monthly expenses did not exceed $2,500 per month; thus, we find no abuse of discretion in the trial court's award.

II.

Wife contends that the trial court erred when it conditioned husband's obligation to pay child support upon his "being allowed to exercise visitation rights without interference" from wife or the minor child. This contention is sound. The law imposes upon parents an obligation of child support. (Civ. Code, §§ 242, 4700.) "This obligation continues notwithstanding the parents' lack of custody [citation] . . . . The extent of the parental support obligation is left to the sound discretion of the court [citations] and the trial court's order will not be disturbed on appeal unless that discretion is abused. [Citation.]" (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 947.) There has been some divergence among the California decisions with respect to the effect on support obligations of the custodial parent's disobedience to a visitation order. Several courts have held that a mother is estopped to enforce child support payments where she has displayed an intent to frustrate the father's visitation rights. (*Szamocki v. Szamocki* (1975) 47 Cal.App.3d 812, 818-820; see *Spurrell v. Spurrell* (1962) 205 Cal.App.2d 786, 789 [action by mother to enforce child support obligation of father under Washington State decree providing for reduction of child support payments upon denial of visitation rights].) However, other courts have disapproved expungement of the child support obligation to punish a recalcitrant custodial parent. "[W]e do not regard an order depriving the children of support for an alleged fault of the mother (especially when such fault is unproven) as a proper exercise of the court's discretion . . . ." (*Ernst v. Ernst* (1963) 214 Cal.App.2d 174, 179; see *Clarke v. Clarke* (1970) 4 Cal.App.3d 583, 589; *Smith v. Superior Court* (1977) 68 Cal.App.3d 457, 465.)

The case of *In re Marriage of Ciganovich* (1976) 61 Cal. App.3d 289, 294, takes a middle ground. In that case, the Court of Appeal summarized the prevailing law as follows: "Confronted with such a situation, a trial court should be concerned with the child's welfare as the paramount consideration. The court should bear in mind that preservation of parental relationships is in the best interest of the child as well as the parent. . . . [¶] [A] mother's sabotage of the father's visitation right furnishes no ground for withholding child support payments. It does provide a ground for a motion to modify the decree which the court should consider as part of the array of circumstances affecting custody and support."

The order here under attack has one specially troublesome effect: it invites husband, when aggrieved in relation to visitation, to withhold support payments instead of obtaining a neutral determination of the merits of the grievance. Moreover, it seems to us that when once the court has determined what child support is necessary and what visitation will be beneficial, all provisions of the decree should be enforced; it benefits none of the parties to recognize (tacitly in regard to visitation and expressly as to support) selective disregard of portions of what should be a coordinated judicial determination of rights and responsibilities. We conclude that it was an abuse of discretion to make husband's obligation to pay child support dependent upon lack of interference with husband's right of visitation.

III.

Wife contends that the court acted contrary to the evidence when it determined that benefits flowing from husband's contract with Kaiser Industries were his separate property. Husband commenced negotiations with Kaiser Industries as early as March 1973. The employment contract was signed November 12, 1973. Paragraph 12 of the agreement provided as follows:

> "*TWELVE.* If the employment of Mr. Roesch with Kaiser shall be terminated for any reason by Kaiser during the term of this Agreement, or at the election of Mr. Roesch pursuant to paragraph ONE hereof, or if Mr. Roesch's employment shall terminate on December 31, 1980 under the terms hereof, Mr. Roesch shall be entitled, in addition to any other rights to which he may be entitled under this Agreement, to receive a special pension from Kaiser in the amount of $75,000 per year, payable in substantially equal monthly installments, from the date of such termination until the death of Mr. Roesch; provided, however, that the amount of such special pension shall be increased by an amount determined by multiplying $3,000 by the number of full years of service to Kaiser performed by Mr. Roesch and shall be reduced by the amount of any benefits payable to Mr. Roesch under Kaiser's Retirement Plan in effect at the time of such termination and by the amounts of any benefits paid to Mr. Roesch under any other industrial private pension plan. In the event of Mr. Roesch's permanent disability, payments under this paragraph shall be made, subject to the conditions thereof, following the expiration of the seven year period provided in paragraph NINE."

A spouse's retirement rights, whether or not vested, represent a property interest, and to the extent such rights

derive from employment during marriage, they comprise a community asset subject to division in dissolution proceedings. (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 844-847; see also *In re Marriage of Skaden* (1977) 19 Cal.3d 679, 682.) Wife points out that husband's employment contract with Kaiser Industries was executed prior to separation; it is argued that the pension benefits provided for in the contract were derived from employment during marriage notwithstanding the fact that respondent did not commence work until after the parties' separation.

Retirement benefits are not gratuities deriving from the beneficence of the employer, but are deferred consideration for past services rendered by the employee. (*In re Marriage of Brown, supra,* 15 Cal.3d at p. 845; *In re Marriage of Jones* (1975) 13 Cal.3d 457, 461.) An employee begins to earn pension benefits when he begins performance of his job. (*In re Marriage of Brown, supra,* 15 Cal.3d at p. 845.)

Husband did not commence performance of his employment contract with Kaiser until January 1, 1974, three days after the parties' separation. If he had entirely breached his side of the bargain by failing to appear and assume his duties, Kaiser would have been relieved of the duty to perform its side of the bargain. (Rest. Contracts, § 274.) Husband did not acquire a property right to Kaiser retirement benefits during marriage.

IV.

Wife contends that the trial court's division of certain assets which it characterized as quasi-community property was improper. Specifically, she challenges the propriety of the trial court's order with respect to retirement benefits

from Jones & Laughlin, certain insurance policies on respondent's life acquired by the parties during marriage, and certain income-producing assets.

In the absence of a statute to the contrary, personal property acquired by a spouse during marriage while domiciled in a common law state does not lose its character as the separate property of the acquiring spouse upon a change of domicile to a community property state. (*Addison v. Addison* (1965) 62 Cal.2d 558, 563; see 14 A.L.R.3d 404, 411-416.) Furthermore, the rule of tracing is invoked so that all property later acquired in exchange for the common law separate property is likewise deemed separate property. (*Id.*)

The Legislature has twice attempted to alter the "domicile of acquisition" principle. A former statutory provision (Civ. Code, § 164 as amended in 1917 [now Civ. Code, § 5110]) attempted to treat as community property all personal property acquired during marriage by either husband or wife, or both, while domiciled elsewhere, which property would have been community property if acquired while domiciled in this state. In *Estate of Thornton* (1934) 1 Cal. 2d 1, this provision was held ineffective, on the basis that changes in the community property system which would impair "vested interests" could not constitutionally be applied retrospectively.

The constitutional foundation of *Thornton, supra,* has arguably been undermined by subsequent decisions holding that vested property rights can be diminished by retrospective application of changes in marital property law if such application is demanded by a sufficiently important

state interest. (*In re Marriage of Bouquet* (1976) 16 Cal. 3d 583, 592; *Addison v. Addison, supra,* 62 Cal.2d 558, 567-569; see generally *Boyd v. Oser* (1944) 23 Cal.2d 613, 623.) Thus, in *Addison v. Addison, supra,* 62 Cal.2d 558, the court held that a 1961 enactment[1] expanding the definition of community property could constitutionally be applied in cases meeting two prerequisite conditions: (1) both parties have changed their domicile to California, and (2) subsequent to the change of domicile the spouses sought in a California court legal alteration of their marital status. Unless both of these conditions exist, the interest of the State of California in the status of the property of the spouses is insufficient to justify reclassification without violating the due process clause of the Fourteenth Amendment and the privileges and immunities clause of article IV, section 2, of the federal Constitution. Additionally, reclassification based upon a mere change of domicile would abridge the privileges and immunities clause of the Fourteenth Amendment.

In the present case the parties lived in Pennsylvania for virtually their entire married life. *After* their separation, husband transferred his domicile to California; wife and

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[1]"As in this part, "quasi-community property" means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

"(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

"(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition."

(Civ. Code, § 4803, based on former Civ. Code, § 140.5 added by Stats. 1961.)

the parties' minor son remained in Pennsylvania. Under these facts, the interest of California in the marital property of the parties is minimal, while that of Pennsylvania is substantial. Moreover, as a domiciliary of Pennsylvania, wife is entitled to the protection of the laws of that state. Application of California's quasi-community property statute was therefore improper. While no modification of the judgment is called for in the absence of an appeal by husband, wife cannot be heard to complain that the apportionment to her was insufficient, from assets which under governing Pennsylvania law were not subject to apportionment at all.

V.

Wife contends that the trial court erred in failing to charge husband for $45,000 which he paid wife for spousal and child support obligations from January 1, 1975, to the date of trial. Husband concedes that these sums were paid out of the Pennsylvania funds, rather than his post-separation earnings.

Civil Code section 4805, as in effect until January 1, 1975, provided:

> "In the enforcement of any decree, judgment or order rendered pursuant to the provisions of this part, the court must resort:
>
> "(a) To the community property; then,
>
> "(b) To the quasi-community property; then,
>
> "(c) To the separate property of the party required to make such payments."

Effective January 1, 1975, section 4805 was amended as follows:

> "In the enforcement of any decree, judgment or order of support rendered pursuant to the provisions of this part, the court shall resort:
>
> "(a) To the earnings, income, or accumulations of either spouse, while living separate and apart from the other spouse, which would have been community property if the spouse had not been living separate and apart from the other spouse; then,
>
> "(b) To the community property; then,
>
> "(c) To the quasi-community property; then,
>
> "(d) To the other separate property of the party required to make such payments."

Under this statute, all payments made by the husband pursuant to a pendente lite spousal and child support order after January 1, 1975, were chargeable first to his separate earnings, income or accumulations. (*In re Marriage of Tammen* (1976) 63 Cal.App.3d 927, 933.) Relying upon *Tammen,* wife contends that the $45,000 in support payments should have been charged against husband's post-separation earnings rather than against assets declared by the court to constitute quasi-community property.

This contention would have had merit if the Pennsylvania assets used by husband for payment of support had been subject to treatment as quasi-community property. But as we have seen, such treatment would not be constitutionally permissible. Therefore, the court acted correctly when it declined to charge husband for using Pennsylvania assets to pay support.

VI.

Wife contends that the findings of fact and conclusions of law rendered by the trial court were insufficient for effective appellate review. This contention is contrary to the well-established rule that the findings of fact should be confined to ultimate material issues in the case, and that "all else is surplusage." (*Denbo v. Senness* (1953) 120 Cal.App.2d 863, 869; *Freeman v. Jergins* (1954) 125 Cal.App.2d 536, 563.)

Findings of fact, filed after trial, should state ultimate facts, not evidentiary facts (*Miller v. Gusta* (1929) 103 Cal.App. 32, 37); the evidence from which an ultimate fact is determined need not and should not be found by the trial court. (*Thomasset v. Thomasset* (1953) 122 Cal. App.2d 116, 129, overruled on another pt., *See v. See* (1966) 64 Cal.2d 778, 786.) Wife complains that she was denied findings on the following evidentiary points: (1) the history of the negotiations between husband and Kaiser; (2) the history of husband's employment with Jones & Laughlin; (3) the terms of husband's employment contract with Kaiser; (4) the terms of husband's termination agreement with Jones & Laughlin; (5) the amount of husband's remuneration from Kaiser Industries; and (6) facts concerning the establishment of the husband's insurance trust with Mellon Bank. Each of these requests relates to evidentiary details and the trial court's refusal to include them in the findings was proper. (*Kanner v. Globe Bottling Co.* (1969) 273 Cal.App.2d 559, 566-567.)

The judgment is modified to delete the provision making husband's obligation to pay child support conditional. As

so modified the judgment is affirmed. Wife will recover costs on appeal. The trial court will hear and determine any application by wife for sounsel fees.

Certified for publication.

Christian, J.

We concur:

Rattigan, Acting P.J.*
Paik, J.*

*Under assignment by the Chairperson of the Judicial Council.

Appendix B

In the Court of Appeal
of the
State of California

First Appellate District
Division Four

1 Civil No. 41179

In re the Marriage of William R. and Helen F. Roesch,

William R. Roesch,
Respondent,

vs.

Helen F. Roesch,
Appellant.

[Filed August 17, 1978]

BY THE COURT:

The petition for rehearing filed in the above entitled cause is hereby denied.

Dated, August 17, 1978

Rattigan, J., Acting P.J.

Appendix C

Clerk's Office, Supreme Court
4250 State Building

San Francisco, California 94102
September 27, 1978

I have this day filed Order Hearing Denied.

In re: 1 Civ. No. 41179 Marriage of Roesch

Respectfully,

G. E. Bishel
Clerk

Appendix D

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Superior Court, State of California
County of Alameda

No.: 451 872-7

In re the marriage of:
Petitioner: William R. Roesch
and
Respondent: Helen F. Roesch

[Filed December 27, 1976]

JUDGMENT DETERMINING CHILD CUSTODY, CHILD SUPPORT, SPOUSAL SUPPORT, PROPERTY DIVISION, ATTORNEYS' FEES & COSTS

The above entitled matter came on regularly for hearing on August 30, September 1, and September 2, 1976, in Department 20 of the above entitled court, the HON. ROBERT H. KRONINGER, Judge presiding; petitioner being present and SUREN TOOMAJIAN and MAX THELEN, JR., of the firm of THELEN, MARRIN, JOHNSON & BRIDGES, appearing as counsel for petitioner, and respondent being present and LAWRENCE H. STOTTER, of the firm of STERN, STOTTER & O'BRIEN, appearing as counsel for respondent.

On the 19th day of September, 1975, an Interlocutory Judgment of Dissolution of Marriage was duly made and entered into by the above entitled court, under the terms of which the court expressly reserved for subsequent determination in the above entitled matter, all issues relating to child custody, child support, spousal support, property division, attorneys' fees and costs; that thereafter and on November 19, 1975, the above entitled court duly caused to be made and entered a Final Judgment of Dissolution of Marriage and that all the provisions of the Interlocutory Judgment were made binding, the same as if set forth in full in said Final Judgment.

The judgment set forth below is intended to resolve all of the aforesaid issues reserved for decision in the aforesaid Interlocutory Judgment of Dissolution of Marriage granted on September 19, 1975.

Evidence both oral and documentary having, on the above mentioned trial dates, been introduced by and on behalf of the respective parties hereto, and evidence being closed and said cause having now been submitted to the court for decision, the court, having heretofore made findings of fact and conclusions of law, concludes that a judgment should be entered as hereinafter set forth.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED, as follows, to wit:

1. That the care, custody and control of the minor child of the parties hereto, namely, DAVID W. ROESCH, born April 2, 1959, be and is hereby awarded to the respondent above named, with reasonable rights of visitation reserved to the petitioner at all reasonable times and places, and upon reasonable prior notice to respondent and the minor child, specifically including, but not limited to, one weekend per month from Friday evening at 6:00 P.M. to Sunday evening at 10:00 P.M., upon 14 days prior notice to respondent and/or the minor child of the parties hereto; petitioner shall have the right to communicate, uninterrupted by respondent, with said minor child by telephone at least one time per week.

2. That the petitioner shall pay to the respondent as and for the support and maintenance of the above named minor child of the parties hereto, the sum of $500.00 per month, said sum payable one-half on the 1st and one-half on the 15th days of each month, commencing October 1, 1976, and to continue thereafter until said minor child reaches the age of 18 years, marries, dies, or the further order of court herein; said child support payments are expressly contingent upon petitioner being allowed to ex-

ercise his visitation rights without interference from respondent and in the event petitioner is denied visitation by respondent or the minor child, then, and in that event, during that period for which visitation has been denied, petitioner shall not be obligated to pay any child support whatsoever to respondent for the benefit of the minor child of the parties hereto.

3. That petitioner shall pay to respondent as and for her spousal support, the sum of $2,500.00 per month, said sum likewise payable one-half on the 1st and one-half on the 15th days of each month, commencing October 1, 1976, and to continue thereafter until the death of either party, the remarriage of respondent, or the further order of court herein. whichever event occurs first.

4. That petitioner, WILLIAM R. ROESCH, is hereby awarded, as his sole and separate property, the following items of quasi-community property at the fair market values set forth below, to wit:

(a) All insurance policies wherein petitioner is the life insured, whether or not contained in the insurance trust created by petitioner in 1967 or not, at a value of $8,187.00	$ 8,187.00
(b) Union Oil Drilling Investment	3,000.00
(c) Conoco Investment	20,544.00
(d) Eastgate Shopping Center and Broad Plains Investment	19,000.00
(e) Remainder of the "Pennsylvania Funds"	36,790.00

(f) Proceeds from the sale of Jones & Laughlin stock option	$ 23,655.00
(g) Community funds used by petitioner for the maintenance of Eastgate and Broad Plains Investments	57,124.00
(h) One-half of the remaining shares of stock, or proceeds therefrom, of the parties hereto with Merrill, Lynch, Pierce, Fenner & Smith, Inc., following payment therefrom to respondent of $30,200.00 or shares of stock of a like value as of September 2, 1976, and attorneys' fees as hereinafter set forth	No Value Assigned
(i) Those items of personal property and effects as set forth in Exhibit "A" attached hereto and incorporated herein by reference, wherever said assets may be situated.	
TOTAL VALUE OF ASSETS AWARDED TO PETITIONER Pursuant to § 4800 of the Civil Code	$168,300.00

5. That respondent, HELEN F. ROESCH, is hereby awarded, as her sole and separate property, the following items of quasi-community property at the fair market values set forth below, to wit:

(a) Family home commonly known and designated as 2365 Birkshire Drive, Upper St. Claire Township, Pennsylvania	$ 80,000.00

(b) Household furniture, furnishings, appliances and effects, save and except any of those items of petitioner's personal property as set forth in Exhibit "A" attached hereto and by this reference made a part hereof, which items are expressly awarded to petitioner	$ 20,000.00
(c) Those shares of stock standing in the name of respondent alone and in respondent's possession	10,700.00
(d) 1971 Ford automobile presently in respondent's possession	1,400.00
(e) That certain ruby ring presently in respondent's possession	2,000.00
(f) Quasi-community funds lost to the parties by reason of respondent's refusal to execute a joint federal and state income tax return for 1974	24,000.00
(g) Cash or stock of a like value as of September 2, 1976, from the parties' joint account at Merrill, Lynch, Pierce, Fenner & Smith, Inc.	30,200.00
(h) One-half of the remaining shares of stock, or proceeds therefrom, of the parties hereto with Merrill, Lynch, Pierce, Fenner & Smith, Inc., following payment therefrom to respondent of $30,200.00 or shares of stock of a like value as of September 2, 1976, and attorneys' fees as hereinafter set forth	No Value Assigned
TOTAL VALUE OF ASSETS AWARDED TO RESPONDENT	$168,300.00

6. That any retirement benefits received by petitioner by reason of his former employment with Jones & Laughlin Steel Corporation shall be divided equally between petitioner and respondent, if, as and when petitioner commences receiving such payments.

7. That the four cemetery plots owned by the parties heretofore shall be forthwith offered for sale and sold at the highest market price available, and the net proceeds divided equally between the parties hereto.

8. That all of the benefits which petitioner has received or will receive by reason of his employment agreement with Kaiser Industries, Inc. are hereby confirmed to him as his sole and separate property, said benefits constituting the fruits of his efforts subsequent to the separation of the parties hereto within the meaning of § 5118 of the California Civil Code, and respondent has not had, nor does she now have, any community, quasi-community or other interest therein whatsoever.

9. That the parties hereto shall liquidate sufficient shares of stock in the Merrill, Lynch, Pierce, Fenner & Smith Inc. joint stock account of the parties hereto, subsequent to the payment to respondent of the $30,200.00 in cash or stock as hereinafter set forth, to pay each attorney in this action, namely, SUREN TOOMAJIAN and MAX THELEN, JR., of the firm of THELEN, MARRIN, JOHNSON & BRIDGES, for petitioner, and LAWRENCE H. STOTTER, of the firm of STERN, STOTTER & O'BRIEN, for respondent, the sum of $12,500.00 each, for a total of $25,000.00, on account of attorneys' fees and costs incurred in this matter, said sum to be in addition to any

and all sums previously ordered or paid to each of such attorneys, and said sum to be payable forthwith.

10. That each of the parties hereto shall assume and personally pay all other of his or her own court costs and additional fees for his or her own attorneys, accountants, investigators, respectively; except as hereinabove expressly provided to the contrary.

Done this December 27, 1976.

Robert H. Kroninger
Judge of the Superior Court

EXHIBIT "A"

1. Books in petitioner's personal library, including, but not limited to the following, to wit:

Author	*Title*
Gibbons	*Rise and Fall of the Roman Empire*
Don Posos	*The Life of Woodrow Wilson*
Schlesinger ..	A series of four books on Franklin D. Roosevelt beginning with *The New Order*
Churchill	*History of the English Speaking Peoples* (five volumes)
Churchill	*The War Years*—beginning with *The Gathering Storm* (three volumes)
Bruce Caton and Douglas Freeman	Novels on the Civil War
Will Durant	Two remaining volumes consisting of *Our Oriental Heritage* and *The Age of Reason*

2. Still life picture given by petitioner's mother.

3. A cane owned by petitioner's great-grandfather.

4. Cut glass punch bowl set, including stand, cups and ladle.

5. Antique pocket watch owned by petitioner's great-grandfather.

6. Family pictures taken by petitioner.

7. Tools and personal effects of petitioner.

Appendix E

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Attorneys for Petitioner

Superior Court State of California
County of Alameda

No. 451-872-7

In re the marriage of:
Petitioner: William R. Roesch
and
Respondent: Helen F. Roesch

[Filed December 27, 1976]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An Interlocutory Judgment of Dissolution of Marriage having been made and entered in the above-entitled matter on September 19, 1975, which said judgment reserved jurisdiction over all issues except marital status, and a

Final Judgment of Dissolution of Marriage having been made and entered on November 19, 1975, this proceeding for determination of all remaining issues came on regularly for hearing on August 30, September 1, and September 7, 1976, in Department 20 of the above-entitled Court, the HON. ROBERT H. KRONINGER, Judge presiding; petitioner being present and SUREN TOOMAJIAN and MAX THELEN, JR., of the firm of Thelen, Marrin, Johnson & Bridges, appearing as counsel for petitioner, and respondent being present and LAWRENCE H. STOTTER, of the firm of Stern, Stotter and O'Brien, appearing as her attorney, and both parties having been sworn and testified, and evidence, both oral and documentary having been introduced, and the Court being fully advised in the premises, the matter was submitted to the Court for decision. On September 2, 1976, this court set forth its statement of intended decision which was duly recorded in the minutes of said court. On September 7, 1976, respondent's counsel requested Findings of Fact and Conclusions of Law, and on September 10, 1976, the above-entitled court directed counsel for petitioner to prepare such Findings of Fact and Conclusions of Law. The court now makes the following Findings of Fact and Conclusions of Law, to wit:

FINDINGS OF FACT

1. Petitioner and Respondent were married on April 14, 1947, in Brownsville, Pennsylvania and separated in Pennsylvania on or about December 28, 1973, and the time elapsing from the date of the marriage to the date of the separation is twenty-six years, eight months and eleven days.

2. Except for a brief period of time immediately following the marriage of the parties, when they resided in the State of Ohio, both parties were residents of the State of Pennsylvania, a common law, separate property state, through the date of their separation. Respondent has continued to remain, and is now, a resident of the State of Pennsylvania. On or about January 1, 1974, petitioner established his residence in the County of Alameda, State of California, with the intention of making said place his home, and has been since said date, and is now, a resident and domiciliary of the County of Alameda, State of California.

3. There were three children the issue of this marriage, one of whom is now deceased, one of whom is over the age of majority, and one minor child of the parties hereto, namely, DAVID W. ROESCH, born April 2, 1959, age 17 years.

4. Throughout the pendency of this litigation, said minor child has been and remains in the care, custody and control of the respondent, who is a fit and proper person to have custody of said minor child.

5. Petitioner has the ability to pay any amount that is reasonably necessary for the support and maintenance of respondent and the minor son of the parties, namely, DAVID W. ROESCH, age 17.

6. Considering the needs of respondent and the ability of petitioner to pay, and all of the circumstances of the parties, the sum of $2,500.00 per month is a reasonable amount for petitioner to pay to respondent as and for spousal support.

7. Considering the needs of the minor son of the parties, namely, DAVID W. ROESCH, and the ability of petitioner to pay, the sum of $500.00 per month is a reasonable amount for petitioner to pay to respondent as and for the support and maintenance of said minor child.

8. Pursuant to stipulation offered to the court by petitioner and petitioner's counsel, and upon the representations of respondent's counsel as to the time spent by respondent's counsel and the hourly fees regularly charged by respondent's counsel and his law office, that the sum of $12,500.00 is a reasonable amount to be awarded each attorney in this action, in addition to all fees previously ordered or paid and that there are sufficient quasi-community assets in the Merrill, Lynch, Pierce, Fenner & Smith stock account in the names of the parties hereto, from which they should pay said sum to the attorneys for petitioner and respondent respectively. That the quasi-community property awarded to each party in this action is sufficient to allow payment by each such party of his or her own court costs, accountants and additional fees, if any.

9. The parties acquired various assets as tenants by the entireties while residing in Pennsylvania, as provided for by Pennsylvania law, as follows:

(a) Family home commonly known and designated as 2365 Birkshire Drive, Upper St. Clair Township, Pennsylvania;

(b) Furniture, furnishings, appliances and effects situated in the above residence;

(c) 1971 Ford LTD automobile;

(d) Certain jewelry not received as gifts;

(e) The stock account at Merrill, Lynch, Pierce, Fenner & Smith; and

(f) Investment in Union Oil.

Pennsylvania law provides that upon dissolution, the parties' interests in such assets become tenancies in common and are subject to partition. All assets acquired other than said assets held as tenants by the entireties are, under Pennsylvania law, the separate property of petitioner, and would have been under the laws of Pennsylvania the separate property of petitioner and not subject to partition in an action for dissolution of the parties' marriage.

10. Under the laws of the State of California, all of the property acquired by petitioner and respondent during their marriage and held by the parties at the time of their separation, not including separate property of each party as hereinafter set forth, is quasi-community property and subject to division by this court.

11. There is quasi-community property as hereinafter set forth, and each item thereof has been valued as hereinafter set forth based upon the evidence offered to the court including petitioner's offer to buy or sell certain items at specific prices. Said quasi-community property is as follows, to wit:

Family home commonly known and designated as 2365 Birkshire Drive, Upper St. Clair Township, Pennsylvania	$80,000.00
Furniture, furnishings, appliances and effects situated in the above residence	20,000.00

1971 Ford automobile in respondent's possession	$ 1,400.00
A ruby ring in respondent's possession	2,000.00
Shares of stock in respondent's name alone and in respondent's possession	10,700.00
Life insurance policies with petitioner as the life insured	8,187.00
Investment in union oil drilling	3,000.00
Interest in Conoco Exploration Ltd.	20,544.00
Interest in Eastgate Shopping Center and Broad Plains Investment	19,000.00
Proceeds from sale of option to purchase shares of Jones and Laughlin stock	23,650.00

12. Respondent should receive, as her sole and separate property, by reason of the division of the quasi-community property as above set forth, at the aforementioned values, the following items of property, to wit:

(a) The family home commonly known and designated as 2365 Birkshire Drive, Upper St. Clair Township, Pennsylvania.

(b) The household furniture, furnishings, appliances and effects, save and except any of those items of petitioner's personal property as set forth on page 11 of Petitioner's Trial Memorandum as filed with this court which might be located in the above-referenced family home at the present time.

(c) Those shares of stock standing in respondent's name alone as hereinabove set forth.

(d) The 1971 Ford automobile presently in respondent's possession.

The total value of the above property awarded to respondent is $114,100.00.

13. Petitioner should receive as his sole and separate property by reason of the division of the quasi-community property, and at the values as set forth above, the following property, to wit:

(a) All the insurance policies wherein petitioner is the life insured whether or not they are contained in the insurance trust created by petitioner in 1967.

(b) Union Oil Drilling investment.

(c) The Conoco Investment.

(d) The Eastgate Shopping Center and Broad Plains Investment.

(e) The remainder of the "Pennsylvania Funds".

(f) The proceeds from the sale of the Jones and Laughlin stock.

The total value of the above property awarded to petitioner is $111,176.00.

14. Petitioner, during the calendar years 1974 and 1975, used funds from the so-called "Pennsylvania Funds" in the amount of $57,124.00 to maintain the Eastgate Shopping Center and Broad Plains Investment and petitioner should be charged with the sum of $57,124.00 since he has presumably benefited and may continue to benefit from the investment of said funds.

15. The inclusion of the $57,124.00 in funds used by petitioner during 1974 and 1975, from the "Pennsylvania Funds" together with the values of the quasi-community property awarded to him as hereinabove set forth results in a total distribution to petitioner of quasi-community assets and benefits of $168,300.00.

16. By reason of respondent's refusal and failure to act on the prior court order herein as made by JUDGE LINDSAY, the parties suffered a loss of $24,000.00 in tax benefits, which sum should be charged to respondent's share of the quasi-community property as hereinabove awarded to her. The inclusion of said $24,000.00 sum in the values of the property as hereinabove awarded to respondent results in a net amount chargeable to respondent of $138,100.00.

17. If respondent would consent to the filing of an amended joint federal income tax return for the parties for the calendar year of 1974, then, and in that event, respondent should receive credit for whatever amount is actually saved by the parties by reason of the filing of said amended return minus the costs of the preparation and filing of such an amended return which respondent shall assume and personally pay and hold petitioner free and harmless from any liabilities therefor.

18. That the distribution of the quasi-community assets as hereinabove set forth results in a net disparity in favor of petitioner in the amount of $30,200.00. It is therefore necessary, in order to equalize the division of said quasi-community assets for respondent to receive, from the stock account of the parties hereto with Merrill, Lynch, Pierce,

Fenner & Smith, Inc. as set forth in Exhibit "B" to petitioner's Trial Memorandum, said cash sum of $30,200.00, or shares of stock of a like value as of September 2, 1976, at the option of respondent. In the event that respondent elects to receive cash in said amount, then, and in that event, the parties shall liquidate sufficient shares of stock from said account to allow the payment to respondent of said cash sum of $30,200.00. The remainder of said stock account shall be used to pay attorney's fees as hereinabove set forth with any residue to be equally divided between the parties.

19. At the time of the separation of the parties hereto, petitioner had assigned a portion of his retirement benefits by reason of his former employment with the Jones & Laughlin Steel Corporation for the benefit of the daughter of the parties hereto. This asset, at the time said assignment was made, was the separate property of petitioner under the laws of the State of Pennsylvania, was not at said time a quasi-community asset, and any assignment made by petitioner prior to said assets becoming a quasi-community asset was valid, and this court does not have the jurisdiction to nullify said assignment. The remainder of said retirement benefits receivable by petitioner by reason of his former employment with Jones & Laughlin Steel Corporation constitutes a quasi-community asset and the same should be divided equally between the parties if, as, and when petitioner commences receiving such payments.

20. There exist certain items of personal property which should be confirmed to petitioner as his sole and separate property and those items are set forth on lines 10 through

16 on page 11 of Petitioner's Trial Memorandum as filed with this court. Any of said items which are in the possession of respondent should be delivered by respondent to petitioner at the earliest possible time in the condition in which they were left in the family home by petitioner at the time of his removal from said family home.

21. The remaining quasi-community asset to be disposed of is the four cemetery plots owned by the parties. There exists no fair way to determine the ultimate disposition of the cemetery plots. The parties themselves, through their attorneys, should agree upon a disposition of said cemetery plots, and in the event that no agreement can be reached, then, and in that event, the said cemetery plots should be sold at the highest available price, and the proceeds divided equally between the parties.

22. All of the benefits which petitioner has received or will receive by reason of his employment agreement with Kaiser Industries Incorporated, constitute the fruits of his efforts subsequent to the separation of the parties hereto and should be confirmed to him as his sole and separate property.

23. Petitioner is entitled to see and visit the minor son of the parties hereto, namely DAVID W. ROESCH. Petitioner has heretofore been unsuccessful in the vast majority of his attempts to speak and visit with said minor child and it is therefore necessary for petitioner to receive some assurance that he will be able to visit with said minor son at reasonable times upon reasonable prior notice to respondent and the minor child of the parties hereto. To that end, petitioner should be entitled to terminate any child

support payments as herein ordered in the event that either respondent or the minor child of the parties hereto sees fit to deny petitioner reasonable visitation upon reasonable prior notice.

CONCLUSIONS OF LAW

1. The care, custody and control of the minor child of the parties hereto, namely, DAVID W. ROESCH, shall be awarded to respondent, reserving to petitioner the right to see and visit said minor child at all reasonable times and places upon reasonable prior notice to respondent and the minor child, specifically including, but not limited to, one weekend per month from Friday evening at 6:00 P.M. to Sunday evening at 10:00 P.M. or any portion thereof, upon fourteen days prior notice to respondent and/or the minor child of the parties hereto. Additionally, petitioner shall have the right to communicate with said minor child by telephone at least one time each week.

2. That petitioner shall pay to respondent as and for the support and maintenance of said minor child of the parties hereto the sum of $500.00 per month, said sum to be payable one-half on the first and one-half on the fifteenth days of each month, commencing with that payment due and owing October 1, 1976, and continuing thereafter until said minor child reaches the age of eighteen, marries or dies, said child support payments to be contingent upon petitioner being allowed to exercise visitation without interference from respondent as hereinabove set forth.

3. In the event that petitioner is denied visitation as hereinabove set forth for any reason by respondent or the minor child of the parties hereto, then, during that period

for which visitation has been denied, petitioner shall not be obligated to pay any child support whatsoever to respondent for the benefit of the minor child of the parties hereto.

4. Petitioner shall pay to respondent as and for spousal support the sum of $2,500.00 per month, said sum payable one-half on the first and one-half on the fifteenth days of each month, commencing with that payment due and owing on October 1, 1976, and continuing thereafter until the death of either party, the remarriage of respondent, or the further order of court herein, whichever event occurs first.

5. That petitioner shall receive as his sole and separate property by reason of the division of the quasi-community property as found by this court the following items at the following values, to wit:

(a) All insurance policies wherein petitioner is the life insured whether or not they are contained in the insurance trust created by petitioner in 1967	$ 8,187.00
(b) Limited partnership interests in Union Oil Drilling Company	3,000.00
(c) Limited partnership interest in Conoco Exploration Limited	20,554.00
(d) Limited partnership interest in the Eastgate Shopping Center and Broad Plains Investment	19,000.00
(e) Remainder of the "Pennsylvania Funds"	36,790.00
(f) Proceeds from the sale of Jones & Laughlin Stock Option	23,655.00

(g) Other "Pennsylvania Funds" used to maintain Eastgate Shopping Center and Broad Plains Investment	$57,124.00
(h) One-half of the proceeds from the sale of stock (or equal value of stock in kind) from the Merrill, Lynch, Pierce, Fenner & Smith, Inc. stock account of the parties hereto, as set forth in Exhibit "B" to Petitioner's Trial Memorandum after payment to respondent of $30,200.00 (or stock of like value as of 9/2/76) and attorney's fees as hereinafter set forth.	
(i) One-half of petitioner's retirement benefits by reason of his former employment with Jones & Laughlin Steel Corporation. No value assigned.	
(j) One-half of the proceeds of the sale of the cemetery plots and those items of personal property belonging to petitioner as set forth on page 11 of Petitioner's Trial Memorandum as filed with this court. No value assigned.	

6. Respondent shall receive by reason of the quasi-community property as found to exist by this court at the values as hereinafter set forth, the following, to wit:

(a) The family home commonly known and designated as 2365 Birkshire Drive, Upper St. Clair Township, Pennsylvania	$80,000.00
(b) Household furniture, furnishings, appliances and effects situated in the above referenced home, save and except any of those items of petitioner's personal property as set forth on page 11 of Petitioner's Trial Memorandum as filed with this court.	20,000.00

(c) One ruby ring. 2,000.00

(d) Those certain shares of stock standing in respondent's name alone and in respondent's possession. 10,700.00

(e) 1971 Ford automobile presently in respondent's possession. 1,400.00

(f) Cash proceeds from sale, or stock of like value, from the Merrill, Lynch, Pierce, Fenner & Smith, Inc. stock account of the parties hereto 30,200.00

(g) Funds lost to parties by reason of respondent's refusal to sign 1974 joint income tax return. 24,000.00

(h) One-half of the proceeds of the sale of the cemetery plots owned by the parties. No value assigned.

(i) One-half of the retirement benefits owing to petitioner by reason of his former employment with Jones & Laughlin Steel Corporation as were owing to petitioner at the time of the separation of the parties hereto, if, as and when the said benefits are received by petitioner.

7. Petitioner shall have confirmed to him, as his sole and separate property, any and all benefits received or to be received by petitioner by reason of his employment agreement, or his continuing employment with Kaiser Industries, Incorporated, said benefits accruing to petitioner subsequent to the separation of the parties hereto.

8. Respondent shall have confirmed to her as sole and separate property any and all jewelry in her possession, save and except the ruby ring as hereinabove set forth,

said jewelry having been received by respondent as gifts during the marriage.

9. Petitioner and respondent shall liquidate sufficient shares of stock in the Merrill, Lynch, Pierce, Fenner & Smith, Inc. stock account of the parties hereto as set forth in Exhibit "B" to Petitioner's Trial Memorandum, to pay to each attorney in this action the sum of $12,500.00 or a total of $25,000.00.

10. Each party shall pay his or her own court costs and additional fees for his or her own attorneys, accountants, investigators, etc.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: Dec. 27, 1976

Robert H. Kroninger
Judge of the Superior Court

Appendix F

Certified for Publication

In the Court of Appeal
of the
State of California

First Appellate District
Division Four

1 Civil No. 41179

(Superior Court No. 451872-7)

In re the Marriage of William R. and Helen F. Roesch

William R. Roesch,

Respondent,

vs.

Helen F. Roesch,

Appellant.

[Filed May 28, 1978]

OPINION

Helen M. Roesch (wife) appeals from certain provisions of a decree which dissolved her marriage to William R. Roesch (husband). The parties were married in Brownsville, Pennsylvania, on April 17, 1947, when both were aged 21; they separated in Pittsburgh, Pennsylvania, on

December 28, 1973. The parties have two children, a daughter who is of age, and a minor son, David, born April 2, 1959.

Before the birth of the first child in July 1948, wife was briefly employed in an unskilled job. Since that time, however, she has been occupied exclusively as a homemaker.

Except for a brief period early in the marriage, the marital domicile was Pennsylvania, a common law state. When husband left the household he established his residence in California. Wife and the parties' son, David, have remained in Pennsylvania.

During virtually the entire period of the marriage, husband was employed by Jones & Laughlin Steel Corporation in Pittsburgh, Pennsylvania. He began as a coal miner, and gradually rose through the ranks of that corporation until on October 1, 1970, he was elected to the position of president and chief executive officer. His total gross earnings in that position were $163,000 in 1971. On January 1, 1972, husband was elected chairman of the board of directors and president at a base annual salary of $200,000.

In 1973, husband entered negotiations for employment with Kaiser Industries Corporation of Oakland, California. On November 12, 1973, prior to his separation from wife and while still employed with Jones & Laughlin Steel Corporation, husband entered into an employment agreement with Kaiser. Under the terms of the agreement, husband was to assume the position of president and chief executive officer commencing January 1, 1974, and ending December 31, 1980, with a right of extension to May 31, 1990. The agreement set a base salary of $225,000 per year plus bonuses and other benefits.

Prior to the marriage, husband took out two policies insuring his own life. One of these policies, with a face value of $2,500, was paid in full prior to marriage. The other, a U.S. National Service Life Insurance policy with a face value of $10,000, was paid partly with premarital earnings and partly with postmarital earnings.

During the 27-year marriage and prior to the date of separation, four more life insurance policies were obtained on husband's life. Wife had been named as a primary beneficiary in each of the above policies. On October 10, 1967, husband transferred the policies to Mellon National Bank and Trust Company as trustee. Under the original terms of the trust, wife was named as income beneficiary, with power to invade the principal. However, on December 17, 1973, just before the parties separated, husband amended the trust to provide that upon his death the trust assets would pass into his estate to be used for certain estate purposes with the remainder to go to his children. At the time of the parties' separation the face value of the insurance policies was $130,000. At trial, the value of the insurance trust was approximately $1,000,000.

Also during December 1973, husband assigned to his daughter a portion of his vested retirement benefits from Jones & Laughlin. The effect of this assignment was to reduce from $20,179 per year to $18,000 per year the benefit husband will receive when the pension matures.

When the parties separated, husband moved his domicile to California; on January 1, 1974, he began performance of his employment agreement with Kaiser. In July 1974, husband commenced the present action for marital dissolution in Alameda County.

There was evidence that during the marriage the parties acquired as tenants by the entireties, as provided by Pennsylvania law, the family home and its furnishings, an automobile, and certain other property.

Certain other assets acquired by husband during the marriage were, under Pennsylvania law, the separate property of husband. These assets included:

1. Interest in Conoco Exploration Ltd.

2. Interest in Eastgate Shopping Center at Garden City, Kansas.

3. The insurance trust held by Mellon Bank as related above.

4. Pennsylvania funds (liquid assets which, at the time of separation, totaled $275,413.86).

The trial court characterized all of the above assets as quasi-community property, and divided them between the parties as follows:

To Wife:

1. The family home, valued at $80,000.

2. Household furniture, furnishings, appliances and effects in the family home, valued at $20,000.

3. Securities standing in wife's name alone and having a value of $10,700.

4. A 1971 Ford automobile, valued at $1,400.

The total value of the property awarded to wife was $114,100.

To husband:

1. All policies insuring husband's life. The cash surrender value of the policies was established to be $8,187.

2. Union Oil Drilling investment, valued at $3,000.

3. Interest in the Conoco Exploration Ltd., valued at $20,544.

4. Eastgate Shopping Center investment, valued at $19,000.

5. Remainder of the Pennsylvania funds, valued at $36,790.75.

6. Proceeds from the sale of Jones & Laughlin stock, valued at $23,650.

The total value of the property awarded to husband was $111,176.

Husband was also charged with the use of $57,124 from the so-called Pennsylvania fund to maintain the Eastgate Shopping Center investment which was awarded to him.

The inclusion of the above amount brought the total value of the quasi-community property awarded to husband to the amount of $168,300. Wife was also charged with $24,000 because of an increased tax liability of husband which resulted from her refusal to file a joint tax return with husband, as the court had ordered. The total amount charged to wife was therefore $138,100. The trial court found a net disparity in favor of husband in the amount of $30,200, and ordered that the disparity be equalized by either the payment of $30,200 from the joint stock account of the parties or shares of stock of a like value as of Sep-

tember 2, 1976, at the option of wife. The parties' joint stock account was to be used to pay attorney's fees with any residue from the account to be equally divided between the parties.

The trial court also found that the unassigned portion of husband's retirement benefits from Jones & Laughlin constitutes a quasi-community asset which should be divided equally between the parties when received by husband. All of the benefits which husband has or will receive under his employment agreement with Kaiser were held to constitute the fruits of his post-separation efforts, and were therefore confirmed to him as his separate property.

At trial husband stipulated, and the trial court found, that husband had the ability to pay any amount reasonably necessary for the support and maintenance of wife and the parties' minor son. Spousal support in the amount of $2,500 per month was ordered, together with $500 per month for child support; husband's obligation to pay child support was made contingent upon non-interference with his reserved visitation rights by either wife or David.

I.

Wife contends that the trial court's award of spousal support in the amount of $2,500 per month is so inadequate as to constitute an abuse of discretion. That contention cannot be sustained.

In setting the amount of spousal support, a wide discretion is vested in the trial court (*In re Marriage of Morrison* (1978) 20 Cal.3d 437, 454), "and thus an appellate court must act with cautious judicial restraint, even though the

particular award might appear on appeal to be modest or generous under the particular circumstances." (*In re Marriage of Lopez* (1974) 38 Cal.App.3d 93, 114.) A trial court has abused its discretion when, after calm and careful review of the entire record, it can fairly be said that no judge would reasonably make the same order under the same circumstances. (*In re Marriage of Lopez, supra,* 38 Cal.App.3d at p. 114; *In re Marriage of Norton* (1976) 71 Cal.App.3d 537, 541.)

Wife received the family home clear of encumbrances. In a pendente lite order, dated October 24, 1975, wife had been awarded $1,650 spousal support and $750 per month child support, for a total of $2,400 per month. Between November 1974 and November 1975, wife had accumulated from these payments savings of approximately $665 per month, for a total of $8,000. The trial court might reasonably infer that appellant experienced no difficulty in living on support payments amounting to less than that which she was awarded in the final judgment.

Wife nevertheless contends that the award is inadequate in view of particular circumstances of the case. She urges that the trial court ignored several crucial factors: husband's ability to pay; the duration of the marriage; the unlikelihood of employment for wife in view of her age, experience and education; the disparity of the award of income-producing assets favoring husband; the comparative financial positions of the parties before and after dissolution. But wife requested that she be awarded the high value, non-income-producing assets and there was evidence that her monthly expenses did not exceed $2,500 per month;

thus, we find no abuse of discretion in the trial court's award.

II.

Wife contends that the trial court erred when it conditioned husband's obligation to pay child support upon his "being allowed to exercise visitation rights without interference" from wife or the minor child. This contention is sound. The law imposes upon parents an obligation of child support. (Civ. Code, §§ 242, 4700.) "This obligation continues notwithstanding the parents' lack of custody [citation] . . . . The extent of the parental support obligation is left to the sound discretion of the court [citations] and the trial court's order will not be disturbed on appeal unless that discretion is abused. [Citation.]" (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 947.) There has been some divergence among the California decisions with respect to the effect on support obligations of the custodial parent's disobedience to a visitation order. Several courts have held that a mother is estopped to enforce child support payments where she has displayed an intent to frustrate the father's visitation rights. (*Szamocki v. Szamocki* (1975) 47 Cal.App.3d 812, 818-820; see *Spurrell v. Spurrell* (1962) 205 Cal.App.2d 786, 789 [action by mother to enforce child support obligation of father under Washington State decree providing for reduction of child support payments upon denial of visitation rights].) However, other courts have disapproved expungment of the child support obligation to punish a recalcitrant custodial parent. "[W]e do not regard an order depriving the children of support for an alleged fault of the mother (especially when such fault is unproven) as a proper

exercise of the court's discretion . . . ." (*Ernst v. Ernst* (1963) 214 Cal.App.2d 174, 179; see *Clarke v. Clarke* (1970) 4 Cal.App.3d 583, 589; *Smith v. Superior Court* (1977) 68 Cal.App.3d 457, 465.) The case of *In re Marriage of Ciganovich* (1976) 61 Cal.App.3d 289, 294, takes a middle ground. In that case, the Court of Appeal summarized the prevailing law as follows: "Confronted with such a situation, a trial court should be concerned with the child's welfare as the paramount consideration. The court should bear in mind that preservation of parental relationships is in the best interest of the child as well as the parent. . . . [¶] [A] mother's sabotage of the father's visitation right furnishes no ground for withholding child support payments. It does provide a ground for a motion to modify the decree which the court should consider as part of the array of circumstances affecting custody and support."

The order here under attack has one specially troublesome effect: it invites husband, when aggrieved in relation to visitation, to withhold support payments instead of obtaining a neutral determination of the merits of the grievance. Moreover, it seems to us that when once the court has determined what child support is necessary and what visitation will be beneficial, all provisions of the decree should be enforced; it benefits none of the parties to recognize (tacitly in regard to visitation and expressly as to support) selective disregard of portions of what should be a coordinated judicial determination of rights and responsibilities. We conclude that it was an abuse of discretion to make husband's obligation to pay child support dependent upon lack of interference with husband's right of visitation.

III.

Wife contends that the court acted contrary to the evidence when it determined that benefits flowing from husband's contract with Kaiser Industries were his separate property. Husband commenced negotiations with Kaiser Industries as early as March 1973. The employment contract was signed November 12, 1973. Paragraph 12 of the agreement provided as follows:

> "*TWELVE.* If the employment of Mr. Roesch with Kaiser shall be terminated for any reason by Kaiser during the term of this Agreement, or at the election of Mr. Roesch pursuant to paragraph ONE hereof, or if Mr. Roesch's employment shall terminate on December 31, 1980 under the terms hereof, Mr. Roesch shall be entitled, in addition to any other rights to which he may be entitled under this Agreement, to receive a special pension from Kaiser in the amount of $75,000 per year, payable in substantially equal monthly installments, from the date of such termination until the death of Mr. Roesch; provided, however, that the amount of such special pension shall be increased by an amount determined by multiplying $3,000 by the number of full years of service to Kaiser performed by Mr. Roesch and shall be reduced by the amount of any benefits payable to Mr. Roesch under Kaiser's Retirement Plan in effect at the time of such termination and by the amounts of any benefits paid to Mr. Roesch under any other industrial private pension plan. In the event of Mr. Roesch's permanent disability, payments under this paragraph shall be made, subject to the conditions thereof, following the expiration of the seven year period provided in paragraph NINE."

A spouse's retirement rights, whether or not vested, represent a property interest, and to the extent such rights derive from employment during marriage, they comprise a community asset subject to division in dissolution proceedings. (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 844-847; see also *In re Marriage of Skaden* (1977) 19 Cal. 3d 679, 682.) Wife points out that husband's employment contract with Kaiser Industries was executed prior to separation; it is argued that the pension benefits provided for in the contract were derived from employment during marriage notwithstanding the fact that respondent did not commence work until after the parties' separation.

Retirement benefits are not gratuities deriving from the beneficence of the employer, but are deferred consideration for past services rendered by the employee. (*In re Marriage of Brown, supra,* 15 Cal.3d at p. 845; *In re Marriage of Jones* (1975) 13 Cal.3d 457, 461.) An employee begins to earn pension benefits when he begins performance of his job. (*In re Marriage of Brown, supra,* 15 Cal.3d at p. 845.)

Husband did not commence performance of his employment contract with Kaiser until January 1, 1974, three days after the parties' separation. If he had entirely breached his side of the bargain by failing to appear and assume his duties, Kaiser would have been relieved of the duty to perform its side of the bargain. (Rest. Contracts, § 274.) Husband did not acquire a property right to Kaiser retirement benefits during marriage.

IV.

Wife contends that the trial court's division of certain assets which it characterized as quasi-community property was improper. Specifically, she challenges the propriety of the trial court's order with respect to retirement benefits from Jones & Laughlin, certain insurance policies on respondent's life acquired by the parties during marriage, and certain income-producing assets.

In the absence of a statute to the contrary, personal property acquired by a spouse during marriage while domiciled in a common law state does not lose its character as the separate property of the acquiring spouse upon a change of domicile to a community property state. (*Addison v. Addison* (1965) 62 Cal.2d 558, 563; see 14 A.L.R.3d 404, 411-416.) Furthermore, the rule of tracing is invoked so that all property later acquired in exchange for the common law separate property is likewise deemed separate property. (*Id.*)

The California Legislature has twice attempted to alter the "domicile of acquisition" principle. A former statutory provision (Civ. Code, § 164 as amended in 1917 [now Civ. Code, § 5110]) attempted to treat as community property all personal property acquired during marriage by either husband or wife, or both, while domiciled elsewhere, which property would have been community property if acquired while domiciled in this state. In *Estate of Thornton* (1934) 1 Cal. 2d 1, this provision was held unconstitutional.

In 1961, the California Legislature again attempted, in a more limited way, to change the status of marital property acquired prior to California domicile. That legislation

defines quasi-community property as follows: "As used in this part, 'quasi-community property' means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

"(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

"(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition." (Civ. Code, § 4803.)

In *Addison v. Addison, supra,* 62 Cal.2d 558, the court held that there was no constitutional violation in applying the new statute in cases meeting two prerequisite conditions which distinguish the *Thornton* holding: (1) both parties have changed their domicile to California, and (2) subsequent to the change of domicile the spouses sought in a California court legal alteration of their marital status. Unless both of these conditions exist, the interest of the State of California in the status of the property of the spouses is insufficient to justify reclassification without violating the due process clause of the Fourteenth Amendment and the privileges and immunities clause of article IV, section 2, of the federal Constitution. Additionally, reclassification based upon a mere change of domicile would abridge the privileges and immunities clause of the Fourteenth Amendment.

In the present case the parties lived in Pennsylvania for virtually their entire married life. *After* their separation, husband transferred his domicile to California; wife and the parties' minor son remained in Pennsylvania. Under these facts, the interest of California in the marital property of the parties is minimal, while that of Pennsylvania is substantial. Moreover, as a domiciliary of Pennsylvania, wife is entitled to the protection of the laws of that state. Application of California's quasi-community property statute was therefore improper. While no modification of the judgment is called for in the absence of an appeal by husband, wife cannot be heard to complain that the apportionment to her was insufficient from assets which under governing Pennsylvania law were not subject to apportionment at all.

V.

Wife contends that the trial court erred in failing to charge husband for $45,000 which he paid wife for spousal and child support obligations from January 1, 1975, to the date of trial. Husband concedes that these sums were paid out of the Pennsylvania funds, rather than his post-separation earnings.

Civil Code section 4805, as in effect until January 1, 1975, provided:

> "In the enforcement of any decree, judgment or order rendered pursuant to the provisions of this part, the court must resort:
>
> "(a) To the community property; then,
>
> "(b) To the quasi-community property; then,
>
> "(c) To the separate property of the party required to make such payments."

Effective January 1, 1975, section 4805 was amended as follows:

> "In the enforcement of any decree, judgment or order of support rendered pursuant to the provisions of this part, the court shall resort:
>
> "(a) To the earnings, income, or accumulations of either spouse, while living separate and apart from the other spouse, which would have been community property if the spouse had not been living separate and apart from the other spouse; then,
>
> "(b) To the community property; then,
>
> "(c) To the quasi-community property; then,
>
> "(d) To the other separate property of the party required to make such payments."

Under this statute, all payments made by the husband pursuant to a pendente lite spousal and child support order after January 1, 1975, were chargeable first to his separate earnings, income or accumulations. (*In re Marriage of Tammen* (1976) 63 Cal.App.3d 927, 933.) Relying upon *Tammen,* wife contends that the $45,000 in support payments should have been charged against husband's post-separation earnings rather than against assets declared by the court to constitute quasi-community property.

This contention would have had merit if the Pennsylvania assets used by husband for payment of support had been subject to treatment as quasi-community property. But as we have seen, such treatment would not be constitutionally permissible. Therefore, the court acted correctly when it declined to charge husband for using Pennsylvania assets to pay support.

VI.

Wife contends that the findings of fact and conclusions of law rendered by the trial court were insufficient for effective appellate review. This contention is contrary to the well-established rule that the findings of fact should be confined to ultimate material issues in the case, and that "all else is surplusage." (*Denbo v. Senness* (1953) 120 Cal. App.2d 863, 869; *Freeman v. Jergins* (1954) 125 Cal.App. 2d 536, 563.)

Findings of fact, filed after trial, should state ultimate facts, and not evidentiary facts (*Miller v. Gusta* (1929) 103 Cal.App. 32, 37) and the evidence from which an ultimate fact is determined need not and should not be found by the trial court. (*Thomasset v. Thomasset* (1953) 122 Cal. App.2d 116, 129, overruled on another pt., *See v. See* (1966) 64 Cal.2d 778, 786.) Wife complains that she was denied findings on the following evidentiary points: (1) the history of the negotiations between husband and Kaiser; (2) the history of husband's employment with Jones & Laughlin; (3) the terms of husband's employment contract with Kaiser; (4) the terms of husband's termination agreement with Jones & Laughlin; (5) the amount of husband's remuneration from Kaiser Industries; and (6) facts concerning the establishment of the husband's insurance trust with Mellon Bank. Each of these requests relates to evidentiary details and the trial court's refusal to include them in the findings was proper. (*Kanner v. Globe Bottling Co.* (1969) 273 Cal. App.2d 559, 566-567.)

The judgment is modified to delete the provision making husband's obligation to pay child support conditional. As

so modified the judgment is affirmed. Wife will recover costs on appeal. The trial court will hear and determine any application by wife for counsel fees.

Certified for publication.

Christian, J.

We concur:

Rattigan, Acting P. J.*

Paik, J.*

---

*Under assignment by the Chairperson of the Judicial Council.

Appendix G

In the Court of Appeal
of the
State of California

First Appellate District
Division F'our

1 Civil No. 41179

In re the Marriage of William R. and Helen F. Roesch,

William R. Roesch, Respondent,
vs.
Helen F. Roesch, Appellant.

BY THE COURT:

The petition for rehearing filed in the above entitled cause is hereby granted.

Dated June 22, 1978

Rattigan, J., Acting P.J.

Appendix H

AMENDMENT XIV—Due Process Clause

"No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

AMENDMENT XIV—Privilges and Immunities Clause

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."

ARTICLE IV, § 2, cl. 1

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Appendix I

California Civil Code Sections

§ 4000. Short title

This part shall be known and may be cited as "The Family Law Act."

§ 4350. Methods of dissolution

Marriage is dissolved only by (1) the death of one of the parties, (2) the judgment of a court of competent jurisdiction decreeing a dissolution of the marriage, or (3) a judgment of nullity.

§ 4506. Grounds for dissolution or legal separation

A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

(1) Irreconciliable differences, which have caused the irremediable breakdown of the marriage.

(2) Incurable insanity.

§ 4507. Irreconcilable differences defined

Irreconcilable differences are those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved.

§ 4530. Dissolution; conversion of separation proceedings

(a) A judgment decreeing the dissolution of a marriage may not be entered unless one of the parties to the marriage has been a resident of this state for six months and

of the county in which the proceeding is filed for three months next preceding the filing of the petition.

§ 4800. Division of community and quasi-community property

Time of division; equality. The court shall, either (a) in its interlocutory judgment decreeing the dissolution of the marriage or in its judgment decreeing the legal separation of the parties, or (b) at a later time, if the division of property is in issue and it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties equally. The equal division provisions of this section shall not prevent the court:

(1) Where economic circumstances warrant, from awarding any asset to one party on such conditions as the court deems proper to effect a substantially equal division of the property;

(2) By way of an additional award or offset against existing property from awarding from a party's share any sum the court determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party.

Community property personal injury damages. Community property personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages, and all other facts of the case, determines that the interests of justice require another disposition, in

which case the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just under the facts of the case. As used in this section, "community property personal injury damages" means all money or other property received by a married person as community property in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages, unless such money or other property has been commingled with other community property.

(Added by Stats. 1969, c. 1608, p. 3333, § 8, operative Jan. 1, 1970.)

§ 4803. Quasi-community property

As used in this part, "quasi-community property" means all personal property wherever situated and all real property situated in this state heretofore or hereafter acquired as follows:

(a) By either spouse while domiciled elsewhere which would have been community property had the spouse acquiring the property been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

For the purposes of this section, personal property does not include and real property does include leasehold interests in real property.

APPENDIX J

Pennsylvania Statutes

§ 10. *Grounds for divorce from bond of matrimony*

1. When a marriage has been heretofore or shall hereafter be contracted and celebrated between two persons, it shall be lawful for the innocent and injured spouse to obtain a divorce from the bond of matrimony, whenever it shall be judged, in the manner hereinafter provided, that the other spouse:

(a) At the time of the contract, was and still is naturally and incurably impotent, or incapable of procreation; or

(b) Has knowingly entered into a second marriage, in violation of the previous vows he or she made to the former spouse whose marriage is still subsisting; or

(c) Shall have committed adultery; or

(d) Shall have committed wilful and malicious desertion, and absence from the habitation of the injured and innocent spouse, without a reasonable cause, for and during the term and space of two years; or

(e) Shall have, by cruel and barbarous treatment, endangered the life of the injured and innocent spouse; or

(f) Shall have offered such indignities to the person of the injured and innocent spouse, as to render his or her condition intolerable and life burdensome; or

(g) Shall have procured the marriage by fraud, force, or coercion, and which has not been subsequently confirmed by the acts of the injured and innocent spouse; or

(h) Shall have been convicted, as principal or as accessory either before or after the fact, within or without this Commonwealth, of the crime of arson, burglary, embezzlement, forgery, kidnapping, larceny, murder either in the first or second degree, assault with intent to kill, voluntary manslaughter, perjury, rape, robbery, sodomy, buggery, pandering, treason or misprision of treason, and be sentenced to imprisonment for any term of two years or more by a competent court having jurisdiction.

2. When a marriage has been heretofore or shall hereafter be, contracted and celebrated between two persons within the prohibited degrees of consanguinity or affinity, according to the tables established by law, it shall be lawful for either of said parties to obtain a divorce from the bond of matrimony, in the manner hereinafter provided; or

3. If any spouse, upon any false rumor in appearance well founded of the death of the other, when such other has been absent for the space of two whole years, hath married or shall marry again, the party who has not remarried may at his or her return have his or her own marriage dissolved by divorce on the ground of bigamy, leaving the other party to remain with the second husband or wife. Any such action shall be instituted within six months after such return. 1929, May 2, P.L. 1237, § 10; 1943, March 19, P.L. 21, § 1.

4. Where there is insanity or serious mental disorder which has resulted in confinement in a mental institution for at least three years immediately before the filing of the complaint, where there is no reasonably foreseeable prospect of the defendant spouse's being discharged from in-

patient care during the next three years subsequent to the filing of the complaint. A presumption that no such prospect of discharge exists shall be established by a certificate of the superintendent of such institution to that effect and such certificate shall include a supporting statement of a treating physician.

§ 501. *Divorced tenants by entireties hold as tenants in common; suit for sale and division of proceeds*

Whenever any husband and wife, hereafter acquiring property as tenants by entireties, shall be divorced, they shall thereafter hold such property as tenants in common of equal one-half shares in value and either of them may bring suit in the court of common pleas, sitting in equity, of the county where the property is situate, against the other to have the property sold and the proceeds divided between them. The summons in such suit shall be served in the same manner and with like effect as in cases of partition at law.

At the hearing on such suit both husband and wife shall be competent witnesses. The value of the property shall be proven by the testimony of at least two impartial and disinterested witnesses. 1927, May 10, P.L. 884, § 1; 1949, May 17, P.L. 1394, § 1.

Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1020

HELEN F. ROESCH,
Petitioner,

vs.

WILLIAM R. ROESCH,
Respondent.

Brief of Respondent Opposing Petition for a Writ of Certiorari to the Court of Appeal of the State of California First Appellate District

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1020

HELEN F. ROESCH,
Petitioner,

vs.

WILLIAM R. ROESCH,
Respondent.

Brief of Respondent Opposing Petition for a Writ of Certiorari to the Court of Appeal of the State of California First Appellate District

Respondent William R. Roesch ("Husband") respectfully requests that the petition of Helen F. Roesch ("Wife") for a writ of certiorari to be issued to the California Court of Appeal be denied for the reasons set forth in this brief.

OPINIONS BELOW

The post-trial judgment of the Superior Court of the County of Alameda (Appendix D to Wife's Petition) and the Court's findings of fact and conclusions of law (Appendix E to Wife's Petition) divided the marital property of Husband and Wife equally under California law, pursuant to the trial court's finding that this was quasi-com-

munity property. California Civil Code § 4803.[1] (See Wife's Petition D-4 through D-6.)

Wife appealed the judgment, raising seven contentions, but Wife did not brief any constitutional point. Husband did not appeal, but filed a reply brief which, among other things, objected to the trial court's ruling that Husband's property acquired in Pennsylvania and possessed by him at the time of trial was quasi-community property.[2] Wife elected to file no reply brief.[3]

After hearing oral argument (Husband argued the Constitutional question and Wife did not), the Court of Appeal issued its first opinion on May 28, 1978. (Appendix F to Wife's Petition).

Wife then petitioned the Court of Appeal for rehearing, which petition was granted. (Appendix G to Wife's Petition.) Wife then applied to the Court of Appeal for Leave

---

1. Although this statute is set forth in Wife's petition at page 4, it is repeated here for the convenience of the Court.

Civil Code Section 4803:

> "As used in this part, 'quasi-community property' means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:
>
> (a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.
>
> (b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of the acquisition."

2. Sometimes hereafter loosely referred to as the "Federal question" or the "Constitutional question", although state law and factual issues are also involved.

3. The declaration of Lawrence Stotter, dated June 28, 1978, submitted to the California Court of Appeal in Support of Application for Order Granting Leave to File Supplemental Brief stated: "I am the attorney for the appellant [Wife]. When I received the respondent's brief in this matter, I reviewed it and determined that no Appellant's Closing Brief was required." (Appendix A-2.)

to File a Supplemental Brief. (Appendix A hereto.) Wife's application was denied by an unreported order dated July 6, 1978. (Appendix B hereto.)

The District Court of Appeal issued its second opinion on July 24, 1978. (Appendix A to Wife's Petition.)

Wife then Petitioned to the Court of Appeal for a second rehearing which was denied by order dated August 17, 1978. (Appendix B to Wife's Petition.) Wife then Petitioned for hearing to the California Supreme Court which was denied by order dated September 27, 1978. (Appendix C to Wife's Petition.)

On October 23, 1978, the California Court of Appeal remitted the entire action to the Superior Court for the County of Alameda for proceedings consistent with its July 24 opinion. The Remittitur is unreported and is set forth as Appendix C hereto.

QUESTIONS PRESENTED

1. Did the Court of Appeal correctly rule that on the facts of this case the quasi-community doctrine of Civil Code Section 4803 should not be applied to Husband's separate property?

2. Does this case raise any issue of sufficient importance to deserve review by this Court?

STATEMENT OF THE CASE

Husband and Wife were married in Pennsylvania in 1947. (C.T. 1; R.T. 2.) They separated in Pennsylvania in December, 1973. (Husband's Trial Exhibit 1.) During virtually the entire length of this marriage, Hsuband was employed in Pennsylvania by Jones & Laughlin Steel Corporation ("Jones & Laughlin"). (Husband's Trial Exhibit 1.)

During 1973 prior to the parties' separation Husband was informed by Jones & Laughlin that his job might make it necessary for him to move from Pennsylvania. At the same time, Husband was considered for a job possibility at Kaiser Industries Corporation ("Kaiser") whose headquarters were in Oakland, California. (R.T. 4.) Prior to the parties' separation, Wife absolutely refused to discuss with Husband his possible change of residence or change of jobs. (R.T. 4.)

Also prior to the parties' separation, Wife initiated divorce proceedings against Husband in Pennsylvania. In November, 1973, Wife filed two Pennsylvania actions, one entitled "Complaint for Support," and one entitled "Complaint for Anti-Suit Injunction," in which latter case Wife attempted to enjoin Husband from obtaining a divorce in any other jurisdiction. Shortly thereafter, she also filed a third action, a complaint for divorce, against Husband. (Husband's Trial Exhibits 2 and 5.) On December 19, 1973, the Pennsylvania Court entered an Order that Husband pay to Wife the sum of $2,000.00 per month for her support and the support of their minor child, David. Following the entry of the support order, Wife dismissed the divorce and the anti-suit complaints. (R.T. 135-136.)

Husband and Wife separated permanently December 28, 1973 (C.T. 1.), and Husband then moved to Oakland, California and began employment with Kaiser on January 1, 1974, as President and Chief Executive Officer. (Wife's Trial Exhibit H; R.T. 72.)

On July 10, 1974, Husband filed a petition for dissolution in California, thus commencing this lawsuit. Wife appeared and subsequently filed an Order to Show Cause seeking support higher than she was then receiving pursuant to the Pennsylvania order; she also sought attorneys' fees and

costs. (C.T. 17.) On October 24, 1974, the California Superior Court ordered Husband to pay $2,400.00 per month family support *pendente lite* to Wife. (C.T. 8.) Husband regularly made these payments, so that at all times Wife received support at or above the level ordered by the Pennsylvania Court. (R.T. 6.)

Upon trial, Husband argued that his earnings and accumulations were his separate property and not subject to California's quasi-community property doctrine. The trial court, to the contrary, applied the quasi-community property statute and divided the marital property equally between Husband and Wife. (Wife's Petition, Appendices D and E).

Wife did not dispute the values which the court assigned to any of the assets except as to certain insurance policies in question. Further, Wife did not suggest that the trial court divided quasi-community assets unevenly. Wife's objections were only that she had not been awarded each and every asset which she requested at trial, that the insurance policies were not valued as she had requested, and that she had rights in Husband's employment contract with Kaiser.

Even though the Court of Appeal concluded (as Husband's trial and appellate briefs had argued) that application of California's quasi-community property statute was improper, that Court did not modify the trial court's judgment regarding the apportionment of assets because Husband had not appealed on this issue. (Wife's Petition A-12 through A-14.) Thus Wife has received everything which the trial court awarded to her, but was defeated in her attempt to secure more, the purport of the Appellate Courts' ruling being that Wife had received more than she was entitled to from the trial court.

Husband also respectfully points out that Wife's assertion that Husband could not obtain a divorce in Pennsylvania (Wife's Petition, pp. 5 and 11) has absolutely no foundation or support in this case.

REASONS FOR DENYING THE WRIT

I. This Is Not an Appropriate Case for Exercising Supreme Court Jurisdiction.

A. NO SIGNIFICANT FEDERAL QUESTION IS INVOLVED NOR IS THERE ANY CONFLICT IN THE CIRCUITS.

The Court of Appeal found that California's quasi-community property doctrine should not be applied in this case so as to deprive Husband of his earnings and accumulations accruing to him while he was a resident of Pennsylvania. Whether this be viewed as an exercise of comity due to another state, an interpretation of California Civil Code Sections 4800 and 4803, or as a Federal Constitutional limitation on a California legislative act, no major federal question is involved, nor is there any conflict in the Circuits.

The Supreme Court of California thought that there was no sufficient reason for a hearing.

The exercise by the California courts of comity, or an interpretation by them placing a limitation on the circumstances in which the quasi-community property doctrine will be applied surely raise no significant Federal question. Similarly, the *Addison* decision,[4] in which the California Supreme Court recognized federal constitutional restrictions on the extent to which the quasi-community property doctrine can be stretched abridges no federal rights of Wife and no Supreme Court intervention is either necessary or appropriate.

B. WIFE FAILED TO PROPERLY RAISE ANY FEDERAL QUESTION BELOW.

Wife wants to use this case as a vehicle to explore the relationship between no fault dissolution and the quasi-

4. *Addison v. Addison*, 62 Cal.2d 558, 43 Cal. Rptr. 97 (1965).

community property principle. (And Wife desires that the Court's resolution of the relationship be applied to the facts of this case.) However, Wife failed to brief or orally argue this issue in her appeal until the Court of Appeal had ruled against her.

It is the duty of counsel to see that all points are properly presented in the original briefs or arguments. *City of Saratoga v. Huff*, 24 Cal. App. 3d 978, 101 Cal.Rptr. 32 (1972).

It is inequitable to allow Wife to raise new arguments at this late date. In addition, to allow her to do so contravenes the stated policy of the California Courts requiring litigants to present their cases with care and after full preparation. *See Pacific Finance Corp. v. City of Lynwood*, 114 Cal. App. 509, 300 P. 50 (1931).

To grant Wife's Petition in this instance would both contravene California's stated policy requiring care and preparation and also seriously impede judicial economy at all levels.

II. The Federal Question Was Correctly Decided on the Facts of This Case.

The unusual facts of this case must be noted. It is not a case where both parties were domiciled in California at the time of their separation or at the time these proceedings were commenced. Instead, all acts of the parties leading up to their separation occurred while both parties were domiciled in Pennsylvania. Simultaneous with their separation, Husband accepted employment in California and became a California domiciliary. Wife has never been domiciled in California. Wife refused to discuss changing her residence to California. Under such a state of facts, the Court of Appeal correctly ruled that California should not apply its quasi-community property doctrine.

In the instant case, conflicts of law principles and principles of comity require that the court apply Pennsylvania law and confirm the separate property character of the property of Husband. Any other result would not only be in violation of Husband's constitutional rights, but, contrary to Wife's suggestion, would encourage forum shopping of a blatant nature.[5]

A. ADDISON V. ADDISON LIMITS THE APPLICATION OF CALIFORNIA'S QUASI-COMMUNITY PROPERTY STATUTES.

Section 4800 of the California Civil Code authorizes the court in a California dissolution proceeding to divide any quasi-community property between the parties. Quasi-community property is defined in California Civil Code Section 4803.

Only one decided case, *Addison*, deals in depth with Section 4803 which contains the definition of quasi-community property. Although factually a very different case from the instant case, various points considered and decided by the *Addison* court have relevance here. In *Addison*, the California Supreme Court held that California Civil Code Section 140.5 (now Section 4800) was constitutional. In doing so, however, the court relied heavily upon certain facts.

The Addisons, who were married in Illinois in 1939, had accumulated property as a result of the husband's efforts prior to the time they moved together to California in 1949. The Addisons continued married until 1961 when the wife sued for divorce on grounds of adultery. Since both parties were domiciled in California, there were no

5. Wife's argument would allow a spouse to move from a separate property domicile to a community property domicile, sue for divorce and "automatically" convert the other spouse's separate property into quasi-community property.

problems of jurisdiction, forum shopping, property located outside the state, conflicts of law or comity. The *Addison* case did not overrule the vested rights and "privileges and immunities" notions which were the basis of an earlier case, *Estate of Thornton*, 1 Cal.2d 1, 33 P.2d 1 (1934), which ruled that an earlier legislative attempt to classify all personal property, wherever situated, and all California real property, as community property was unconstitutional. Rather, *Addison* distinguished *Thornton* on grounds that the statute considered there attempted to alter property rights merely upon crossing the boundary into California. Lay, *Marital Property Rights of the Non-Native in a Community Property State*, 18 HAST.L.J. 295, 307-308 (1967).

The *Addison* court very carefully prescribed the limitations on the applicability of former Section 140.5. The court states at page 566:

> The legislation under discussion, unlike old section 164, makes no attempt to alter property rights merely upon crossing the boundary into California. It does not purport to disturb vested rights "of a citizen in another state, who chances to transfer his domicile to this state, bringing his property with him . . ." (*Estate of Thornton, supra*, 1 Cal.2d 1, at p. 5). Instead, the concept of quasi-community property is applicable only if a divorce or separate maintenance action is filed here after the parties have become domiciled in California. Thus, the concept is applicable only if, after acquisition of domicile in this state, certain acts or events occur which give rise to an action for divorce or separate maintenance. These acts or events are not necessarily connected with a change of domicile at all.

Thus, the court recognized three conditions as a prerequisite to the constitutional application of the quasi-community property statutes: (1) Both parties must bring

their marriage to California by changing their domicile; (2) The acts or events constituting grounds for dissolution must occur after both parties have acquired California domicile; and (3) The quasi-community property statute cannot be applied just because one party to a marriage has transferred his domicile to California.

1. Domicile of both parties is required to be in California.

In *Addison*, both parties had been domiciled in California for approximately 12 years before the divorce proceeding was commenced. In the *Roesch* case, Husband had been domiciled in California for approximately six months at the time of commencing this action.[6] Wife is not domiciled in California and never has been, by her own choice. The opinion of the *Addison* court merely defines when California's interest in the parties and their property is sufficient to permit application of the quasi-community property statutes without violating the federal constitution. *See, Marital Property and the Conflict of Laws: the Constitutionality of the "Quasi-Community Property" Legislation*, 54 CAL.L.REV. 252, n. 69 at 264 (1966). *Addison* does require that both parties be domiciled in California. 62 Cal.2d at 567. Without such a requirement there would be a violation of due process and equal protection because California's interest in the parties and their property is not sufficiently great. As a practical matter, the contrary result would make the acquisition of domicile, and not the dissolution or the event leading up to dissolution, become the factor precipitating application of the quasi-community property

6. Kaiser was liquidated subsequent to the trial of this action, and as a result, Husband's employment with Kaiser ceased. (See R.T. 113-114, 118.)

statutes, an unconstitutional result totally inconsistent with comity.[7]

2. Grounds for dissolution must occur in California.

Addison overcame due process objections to the legislation by a "balancing of interests," *i.e.*, it held that the police power of the state may be employed to impair vested rights of an individual when necessary to insure the public welfare. However, the court found that interest sufficiently strong only in certain cases, *i.e.*, in cases where the parties were both domiciled in California and where the events giving rise to (grounds for) the divorce action occurred in California. In the absence of these factors, California has an insufficient interest to justify impairing a spouse's vested property interest and ignoring principles of comity. In the absence of these factors, in essence, the change of domicile alone would be the basis for application of the statute. *Addison*, refusing to overrule the *Thornton* case on this point, held that mere change of domicile was an insufficient basis for applying the quasi-community property statute. 62 Cal.2d at 566. In the words of one commentator, "[i]t is hard to visualize the interest of the state being predominant until some act is committed or some event occurs therein which gives rise to the state's interest. Lay, *supra* at 310.

In the *Roesch* case, all of the events giving rise to the dissolution occurred prior to the separation of the parties, and while both parties resided in Pennsylvania. Wife has never been a California domiciliary. Husband's selection of

7. Given California's no fault dissolution of marriage system (created since *Addison*) such a division would be unreasonable and arbitrary. See *Recommendation and Study Relating to Inter Vivos Rights in Property Acquired While Domiciled Elsewhere (1961)*, 3 Cal.Law Rev. Comm'n Rep. I-5, I-32 through I-34.

a California domicile was not collusive nor an act of forum shopping. It was simply incidental to accepting better employment. The parties were separated, and husband was subject to a support order when he came to California. The parties have been separated ever since Husband came to California. Clearly, the dual requirements are not met, namely that (1) the events giving rise to the dissolution occur in California; and (2) that the parties be domiciled in California when those events occur.

3. Chance transfer to California is not sufficient to invoke the quasi-community statutes.

The *Addison* court distinguished *Thornton* on the ground that the statute being applied in *Addison*, unlike *Thornton*, did not alter property rights merely upon crossing the boundary into California. The *Addison* court held that there must be sufficient state interest to justify the application of a state's substantive law to the division of the parties' property. If the marital rupture occurred prior to the acquisition of domicile by the petitioning party, and while the parties were domiciled elsewhere, California's interest in either the parties or their property is indeed a limited one. Under California's no fault system it would take few contacts to justify a California court in dissolving a marriage, but much more to justify disrupting vested property rights.

It is clear that the *Roesch* case involves a "chance transfer" of domicile (as the Court in *Addison* described it). In the face of long standing marital discord, the filing of divorce and support proceedings by Wife, and the entry of a support order against Husband, he found a better job and therefore changed his domicile. However, his change of domicile was entirely unrelated to the marital discord. Expressed negatively, under the *Addison* rationale, application of the quasi-community property statutes would be

unconstitutional if it forced a citizen of Pennsylvania, such as Husband, to refrain from coming to California for valid economic reasons, merely because he were in the process of becoming divorced. Obviously, that is what would occur if as a consequence of changing domicile, he were to be deprived of one-half of his property.

Expressed another way, it would be an unconstitutional application of the quasi-community property statutes if a party who transfers his job to California in the midst of marital discord is forced to accept as a necessary consequence of that transfer a transformation of his separate property into quasi-community property. His only other alternative would be not to sue for dissolution of the marriage (which is contrary to the public policy behind no fault divorce). Such a party having left his former domicile may be legally unable to commence divorce proceedings in his former state of domicile. Therefore, if the community property state threatens to apply its quasi-community statutes, such party must either give up one-half of his separate property or forego his right to petition for dissolution of the marriage. Obviously, it is the change of domicile alone that precipitates the dilemma. On the other hand, where both parties are domiciled in California and the events of marital discord precipitating the dissolution occur subsequent to the change of domicile to California, as required by *Addison*, application of the quasi-community property statutes is likely to have independent and sufficient jurisdictional basis apart from the mere change of domicile. Where both parties are domiciled in California, both parties have lost contact with the prior domicile and the comity issue is greatly reduced. In that situation, California's interest in the welfare of both parties and in treating those parties the same as its other citizens may become

a paramount interest which does not do violence to the interest of the former domiciliary or the vested property rights of the parties. However, that is a much different case than the *Roesch* case, where Wife chose to continue residing in Pennsylvania, the laws of which have always been available for her protection, and whose protection Wife emphatically invoked by filing three actions against Husband in the Pennsylvania courts, including an action for divorce.

B. THE SUPREME COURT HAS NO STAKE IN EXPANDING THE APPLICATION OF THE QUASI-COMMUNITY PROPERTY DOCTRINE BEYOND THE LIMITS WHICH THE STATE COURTS THINK APPROPRIATE.

1. Fourteenth Amendment due process limitation.

As Wife recognizes in her petition to this Court, the state may only exercise its inherent "police power" when reasonably necessary to protect the safety, morals, health and general well being of its citizens. (Petition, pp. 14-15.)

When a state purports to deprive its citizens of vested property rights, and such deprivation is not reasonably necessary for the protection of its citizens, then that deprivation is in violation of the guarantees and protection of the due process clause of the Fourteenth Amendment. *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928).

The test of this due process limitation is a balancing one, *i.e.*, whether the means employed by the state to effect its regulation bear a real, substantive relationship to the public end or public protection. *Treigle v. Acme Homestead Assn.*, 297 U.S. 189, 197 (1936). The court in *Addison* balanced the police powers against individual property rights and found that the application of California's quasi-community property statute was only justified if both parties were California domiciliaries and events occurring

in California gave rise to grounds for dissolution. 62 Cal.2d at 566.[8]

Even though regulation of domestic relations has long been regarded a province of the states [Wife's Petition, p. 15 citing *Sosna v. Iowa*, 419 U.S. 393, 404-410 (1975)], federal constitutional rights still control state laws, and where those state laws offend constitutional guarantees, those laws will be stricken. *Kulko v. Superior Court*, 436 U.S. 84 (1978). Hence the interpretation which Wife urges must be rejected.

2. Fourteenth Amendment privileges and immunities protection.

The privileges and immunities of the citizens of the United States are protected by separate provisions of the Fourteenth Amendment. *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36 (1872).

In addition to his right to due process to preserve his property rights vested under Pennsylvania law, Husband should be able to enjoy the right to travel and to change both his residence and his domicile as parts of the privileges and immunities guaranteed him under the United States Constitution. *Shapiro v. Thompson*, 394 U.S. 618, 629-631 (1969). If Husband is to be stripped of his property rights by a chance change of domicile to California, this will have a chilling effect upon his right to mobility which violates the Fourteenth Amendment protection under the privileges and immunities clause.

---

8. That the California Supreme Court should so rule is eminently sensible. California Courts may like the California community property system, but it is not inconsistent for the court to do so and still recognize that the overwhelming majority of the states have a totally different system, and find that the application of the quasi-community property doctrine is viewed by them as outrageous.

3. Article IV, section 2, also protects Husband's privileges and immunities.

The purpose of the Article IV, section 2, Privileges and Immunities clause is to protect the citizens of one state from discrimination by another state. *Paul v. Virginia,* 8 Wall. (75 U.S.) 168, 180 (1868).

In this particular instance the application of the protection to Husband is critical in that Wife argues not only that she is entitled to half the "quasi-community property" of the marriage (which she was awarded by the trial court), but also that Husband should be charged under California law for assets which had been his separate property under Pennsylvania law, and which he had assigned to his daughter while he was a resident and citizen of Pennsylvania. The trial court, as well as the appeal court, rejected Wife's claim to such assets.

To allow anyone, even the state of California, to reach back and set aside transfers of Husband's separate property which were perfectly legal in Pennsylvania would be a flagrant violation of his rights while he was a citizen of Pennsylvania.

The opinion of the California Court of Appeal was absolutely correct in citing the Article IV, section 2, privileges and immunities clause as a basis for its conclusion that Husband was protected from such an application of California's quasi-community property statute. (Wife's Petition, A-13.)

III. Wife Has Sustained No Damage by Reason of the Appellate Court's Ruling on the Federal Question.

The trial court found that there was quasi-community property and gave half of it to Wife. (Wife's Petition D-4 through D-6.) Wife appealed asking for a change in the

way the court assigned particular properties to the parties in making an equal division of property and also asking for additional items to be classified as quasi-community property. Therefore the question of whether the wife should get *more* is a purely factual, local question of state law which has been decided against her at the trial level. Husband did not appeal that court's judgment, and hence the rejection of Wife's petition by this court will not cause her any damage which is federally cognizable. She is damaged, if at all, by the trial court's refusal to agree with all of her factual property points.

CONCLUSION

For the foregoing reasons, Husband respectfully requests that Wife's Petition for a writ of certiorari be denied.

Dated: January 22, 1979

Respectfully submitted,

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(Appendices follows)

Appendix A

FILED—JUN 29 1978
Court of Appeal—First App. Dist.
CLIFFORD C. PORTER, Clerk

By .....
Deputy

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IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA
First Appellate District

Division Four

NO. 1 CIVIL 41179

In Re the Marriage of Roesch:
WILLIAM R. ROESCH,
Respondent,

vs.

HELEN F. ROESCH,
Appellant.

DECLARATION AND APPLICATION FOR ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL BRIEF AND ORDER THEREON

The undersigned, LAWRENCE H. STOTTER, says:

I am attorney for the appellant. When I received the respondent's brief in this matter, I reviewed it and determined that no Appellant's Closing Brief was required. On May 23, 1978, this court rendered an opinion in this matter. The opinion appeared to contain an error in constitutional law. I retained appellate specialist, Victoria J. De Goff, attorney at law, to prepare a petition for rehearing in this matter. On June 22, 1978, this court granted appellant's petition for rehearing. The matter is therefore currently pending before this court.

[2]A thorough review of this court's opinion indicated to me and to Ms. De Goff that further briefing on issues other than the constitutional one might be helpful to this court in rendering its opinion in this matter. In part as a result of the court's initial opinion on the constitutional issue, certain other issues were not reached or were decided incorrectly. Indeed, as explained in the Supplemental Brief attached hereto, several issues of significance not only to Mrs. Roesch, but to the law in general in this fast developing area, were not adequately treated. When I was informed that this court did not desire oral argument I retained Ms. De Goff to prepare the attached Appellant's Supplemental Brief which I now seek leave to file. We believe that it will assist this court in the proper disposition of this appeal.

I have proceeded with due diligence in this matter and it is respectfully requested that this court allow appellant to file the attached supplemental brief.

The brief and this application have been served on all parties to the action. If leave to file said brief is granted,

service will forthwith be made upon the Superior Court and the Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at San Francisco, California, on June 28, 1978.

LAW OFFICES OF LAWRENCE H. STOTTER
/s/ By: Lawrence H. Stotter
LAWRENCE H. STOTTER

[3]ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL BRIEF

FOR GOOD CAUSE SHOWN, IT IS ORDERED that appellant is granted leave to file the supplemental brief attached to the Declaration and Application of Lawrence H. Stotter, attorney for Appellant.

DATED: ....., 1978.

.....
PRESIDING JUSTICE OF THE COURT OF APPEAL

Appendix B

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE
First Appellate District

Division Four

FILED—JUL-6 1978
Court of Appeal—First App. Dist.
CLIFFORD C. PORTER, Clerk

By .....
Deputy

In re the Marriage of William R. Roesch and Helen F. Roesch	1 Civil No. 41179
vs.	

BY THE COURT:

Appellant's application for leave to file a supplemental brief is denied.

Dated JUL—6 1978

Rattigan, ACTING P.J.

Appendix C

IN THE
Court of Appeal of the State of California
For the First Appellate District

Division Four

FILED—OCT 24 1978
RENE C. DAVIDSON,
County Clerk
By Pat Clark
DEPUTY

In re Marriage of William R. and Helen F. Roesch
1/Civil 41179
Alameda County $451872-7

REMITTITUR

I, CLIFFORD C. PORTER, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on July 24, 1978 and that this opinion or decision has now become final.

Respondent to recover costs.

WITNESS my hand and the seal of the Court affixed at my office this OCT 23 1978

CLIFFORD C. PORTER, Clerk

By Betty Kavunah
Deputy

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated: 10/24/78
NOV 1 1978

RENE C. DAVIDSON
County Clerk
By: Pat Clark
Deputy Clerk

Supreme Court, U. S.
FILED
FEB 6 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1020

HELEN F. ROESCH,
Petitioner,

vs.

WILLIAM R. ROESCH,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1020

HELEN F. ROESCH,
Petitioner,

vs.

WILLIAM R. ROESCH,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This reply brief is submitted in further support of Helen F. Roesch's Petition for Writ of Certiorari and in response to "Brief of Respondent Opposing Petition for a Writ of Certiorari" served on January 24, 1979. The very arguments urged by respondent in opposition to the granting of a writ of certiorari underscore the importance of the issue presented for review, the error of the decision of the California Court of Appeal of which review is sought, and the propriety of and need for review by this court.

I.

RESPONDENT HAS NOT REFUTED THAT THIS CASE IS IMPORTANT.

In support of respondent's contention that this is not an appropriate case for exercising Supreme Court jurisdiction, respondent makes two arguments both of which are totally devoid of merit.

A. Respondent Does Not Even Discuss The Federal Question Presented.

Respondent first simply asserts that there is no significant federal question. (Brief in Opposition, page 6.) In support of this assertion, respondent either misreads or intentionally mischaracterizes the Court of Appeal decision as possibly an exercise of comity or an interpretation of statute. However, the decision is based on the federal Constitution and this is apparent from the opinion (see especially Appendix A to Petition, pages A-12 to A-14). In particular, the Court of Appeal stated:

> Thus, in *Addison v. Addison, supra,* 62 Cal.2d 558, the court held that a 1961 enactment expanding the definition of community property could constitutionally be applied in cases meeting two prerequisite conditions: (1) both parties have changed their domicile to California, and (2) subsequent to the change of domicile the spouses sought in a California court legal alteration of their marital status. Unless both of these conditions exist, the interest of the State of California in the status of the property of the spouses is insufficient to justify reclassification without violating the due process clause of the Fourteenth Amendment and the privileges and immunities clause of article IV, section 2, of the federal Constitution. Additionally, reclassification based upon a mere change of domicile would abridge the privileges and immunities clause of the Fourteenth Amendment.
>
> In the present case the parties lived in Pennsylvania for virtually their entire married life. *After* their separation, husband transferred his domicile to California; wife and the parties' minor son remained in Pennsylvania. Under these facts, the interest of California in the marital property of the parties is minimal, while that of Pennsylvania is substantial. Moreover, as a domiciliary of Pennsylvania, wife is entitled to the protection of the laws of that state. Application of California's quasi-community property statute was therefore improper. (Footnote omitted.)

The statement that "the interest of California in the marital property of the parties is minimal, while that of Pennsylvania is substantial" is the application to this case of the court's earlier holding that unless both parties have changed their domicile to California and subsequently sought legal alteration of their marital status in a California court, the interest of California in the property is insufficient to justify reclassification without violating the due process clause and the two privileges and immunities clauses.

To the extent that respondent acknowledges that the Court of Appeal decision was indeed based on the Constitution, he makes no argument supported by any reasons as to why this case might be insignificant or unimportant. Instead, he simply states its insignificance as his conclusion. He has ignored all of petitioner's arguments including the substantial bearing of this case on the ability of all

eight community property states to regulate marital property in accordance with their public policy. (Petition, pages 16-17.) This aspect alone makes the federal constitutional question in this case significant.

B. As The Federal Question Was Decided By The Court Of Appeal, It Is Conclusively Presumed To Have Been Properly Raised.

Respondent's second argument is that petitioner failed to raise the federal question properly below. (Brief in Opposition, pages 6-7.) This, too, is incorrect. The trial court decided the federal constitutional question in petitioner's favor. Respondent admits that he did not appeal from this portion of the judgment. Petitioner, of course, did not raise the constitutional question on appeal as it had been decided in her favor by the trial court and respondent had not appealed from the trial court's determination. Indeed, it was petitioner's contention that respondent's argument on the federal question made to the Court of Appeal was outside the legitimate scope of the appeal and that respondent was bound by the unappealed trial court's decision in petitioner's favor on the constitutional issue.

Petitioner was therefore rightfully surprised that the Court of Appeal decision was based on the Constitution. Nonetheless, it was the basis of the Court of Appeal opinion. Therefore whether or not petitioner argued it below becomes irrelevant. Where the lower court reaches the federal question it is sufficient under Supreme Court practice. *Jenkins v. Georgia* 418 U.S. 153, 157 (1974); see also, *OCALA Star-Banner Co. v. Damron* 401 U.S. 295, 299, note 3 (1971); *Ward v. Village of Monroeville* 409 U.S. 57,

61. There can be no question as to the proper presentation of a federal claim when the state court passes on it. An irrebuttable presumption is created that the federal question was timely and properly raised. *Raley v. Ohio* 360 U.S. 423, 436 (1959); see also, *W H Y Y, Inc. v. Borough of Glassboro* 393 U.S. 117, 119 (1968).

II.

RESPONDENT HAS FAILED TO DEMONSTRATE THAT THE CASE WAS CORRECTLY DECIDED BY THE COURT OF APPEAL.

The majority of respondent's brief in opposition is devoted to the merits of this case. (Pages 7 to 16.) Petitioner, of course, has not submitted a full brief on the merits as it would be inappropriate to do so in a Petition of Writ of Certiorari. It is precisely in order that the merits be briefed that petitioner requests this court to grant the writ. However, petitioner will briefly answer respondent's arguments below.

A. Respondent Is In Error As To The Meaning Of The Addison Decision.

Respondent devotes approximately six pages to the California Supreme Court decision in *Addison v. Addison* 62 Cal.2d 558, 43 Cal.Rptr. 97, 399 P.2d 897 (1965). (Brief in Opposition pages 8 to 14.) As discussed in the Petition, the *Addison* decision and the development of the constitutional issue in this case in California state courts prior to the present decision supports petitioner herein. (Petition, pages 11 to 14.) However, since respondent has dealt with *Addison* totally out of its California context, petitioner has attached hereto as Appendix A and incorporates herein

by this reference, a section of her petition for rehearing filed in the Court of Appeal which briefly explains the development of this body of constitutional law in California which was set back almost 50 years by the Court of Appeal's decision herein.

B. Respondent Admits That Petitioner's Interpretation Of The Constitution Is Correct And That This Case Presents An Important Constitutional Question.

Respondent's discussion of the Fourteenth Amendment due process clause (Brief in Opposition, pages 14-15) could have been written by petitioner. Respondent acknowledges that a balancing test is applicable to determine whether the state's inherent police power has been properly used by the legislature to protect the safety, moral health and general well being of the people. Respondent, however, seems to forget that it is California legislation which petitioner seeks to have applied. It can be struck down only if it is unconstitutional and not merely because other states such as Pennsylvania view community property or quasi-community property concepts as outrageous.[1]

Respondent's Fourteenth Amendment privileges and immunities discussion (Brief in Opposition, page 15) raises an additional important federal question, namely, whether

[1]Subsequent events further demonstrate the irreconcilable differences between the totality of California and Pennsylvania law rendering piecemeal application as here unjustifiable. (See Petition, pages 6-8, 11, 13-14.) Pennsylvania does not permit alimony or spousal support to be awarded to a wife after a final divorce. As a result, Pennsylvania also refuses to give full faith and credit to other States' decrees for support after divorce. *Commonwealth ex. rel. Platt v. Platt* 333 A.2d 29, 30-31 (Penn. Sup. Ct. 1974); *Watson v. Watson* 364 A.2d 431, 433 (Penn. Sup. Ct. 1976). Petitioner is therefore confronted with unique and severe enforcement problems.

the California legislation is perhaps unconstitutional because it interferes with the constitutional right to travel.

Respondent's Article IV, section 2, privileges and immunities argument is a total non-sequitur. Petitioner has requested this court to decide the constitutional issue and then to remand this case to the Court of Appeal to apply California law to the property issues on the merits. (See Petition, pages 10 and 11, fns. 4 and 5.)

C. Petitioner Was Substantially Damaged.

Respondent contends that petitioner was not damaged because she was awarded more than a Pennsylvania court would give her. (Brief in Opposition, pages 4-5 and 16-17.) Respondent's references in his Statement of the Case to prior actions filed and abandoned by petitioner in Pennsylvania have nothing to do with the legal issues in this case.

As explained in the petition, it was and is petitioner's contention that she was entitled to approximately a million dollars more in property than the trial court awarded her. (Petition, pages 10 and 11, fns. 4 and 5.) It was because of the Court of Appeal's erroneous application of the Constitution that it did not consider petitioner's claims of error regarding application of California law on the property division. Respondent further misses the point that a Pennsylvania court would have protected petitioner by refusing to allow respondent to terminate the marriage.

III.

THE ERRONEOUS CHARACTERIZATION OF THIS CASE BY RESPONDENT FURTHER DEMONSTRATES THE NECESSITY FOR FULL AND COMPLETE BRIEFING AFTER THE GRANTING OF THE WRIT.

Respondent's Brief in Opposition throughout also contains arguments and factual points which are either irrelevant or misleading. It attributes to petitioner certain arguments not advanced by her petition and mischaracterizes the record and the result of the Court of Appeal. Petitioner has demonstrated above that respondent has failed to refute the importance of this case and has failed to demonstrate that it was decided correctly or that she was not damaged. In this section, petitioner will now briefly correct the most egregious of respondent's other errors and inaccuracies.

1. The supplemental brief which the Court of Appeal denied petitioner leave to file did not contain constitutional arguments, but involved property issues, the majority of which were not considered by the Court of Appeal because of its erroneous decision on the federal question. (Brief in Opposition, pp. 2-3.) Petitioner sought leave to file this brief after the Court of Appeal had granted a rehearing and while the matter was pending. It then rendered a second opinion which was virtually the same as the first opinion, both of which decided the constitutional issue against petitioner. Apparently the Court of Appeal felt no need to permit a filing of a supplemental brief on the merits of the state issues as it had no intention of reaching them given its constitutional holding.

2. Respondent's move to California was neither necessary nor a "chance transfer". (Brief in Opposition, pages 4 and 12-13.) He was President and Chairman of the Board of Jones & Laughlin Steel Corporation in Pennsylvania. He made a deliberate decision to leave this employment and carefully negotiated a lucrative contract to become Chairman of the Board and Chief Executive Officer of Kaiser Industries in California, earning more than $400,000 a year, with a provision for income of $75,000 a year for ten years after termination of his employment at Kaiser for any reason including cause. Respondent did not come to California as the result of a simple in-house transfer of a low level employee, but by his own decision—that of a man who could write his own ticket. Indeed, though not reflected in the record, respondent has now returned to Pennsylvania with his new wife, having obtained a no fault dissolution of his marriage under California law.

3. Contrary to respondent's assertions (Brief in Opposition, pages 4, 5 and 8 fn. 5), the adoption of petitioner's position would not allow a spouse to move to a community property state and thereby automatically convert the other spouse's separate property into quasi-community property. Indeed, this court's decisions in *Estin v. Estin* 334 U.S. 541 (1948) and *Vanderbilt v. Vanderbilt* 354 U.S. 416 (1957) establishing "divisible divorce" prohibit such a result. In order to prevent the result suggested by respondent, the spouse who does not move need only refuse to appear in the new domicile and that court cannot divide the property.

In the present case, as in many similar fact situations throughout the country, the acquiring spouse is the party who moves, seeks to terminate the marriage and who should

be required to share his property with the other non-acquiring spouse he left behind. Where the acquiring spouse, as here, seeks the aid and protection of California law, it should be applied if the non-acquiring spouse, as here, voluntarily appears in the action. Indeed, under respondent's interpretation of the Constitution, quasi-community property law could be applied if petitioner had only moved to California instead of just making a general appearance in California. It is petitioner's further contention that to refuse to apply California law to her because she is not a domiciliary could itself be unconstitutional.

4. Even if the *Addison* decision were limited to its facts, petitioner fits within these facts for the following reasons: The grounds for dissolution of marriage in California are irreconcilable differences. Respondent contends that petitioner's failure to come to California is the basis on which he sought a dissolution. This necessarily occurred after respondent came to California. Thus, the grounds which gave rise to dissolution occurred after respondent had moved to California.

Insofar as domicile is important to the determination of the constitutional question, it is important only in order to insure that California does not overreach by applying its law to a party with whom it has insufficient contact. In the present case, respondent, the party who seeks to avoid application of California law, himself was the party who sought the application of California law and the jurisdiction of its courts to dissolve his marriage. It would thus only be the nondomiciliary petitioner whose rights might need to be protected by a refusal to apply California law. However, petitioner voluntarily agreed to appear in

California and that its law be applied. Respondent, the resident and domiciliary of California, should not be heard to complain of the application of California law.

5. The facts in this case are not "unusual". (Brief in Opposition, page 7.) It is precisely on the facts of this case that the constitutional issue is commonly presented in our mobile society. The spouse acquiring property in one state left the state of the marital domicile and dissolved his marriage in a community property state. The community property state provides that on dissolution, the marital property is to be divided equally or equitably between the parties. Whether this strong public policy of the community property state may be constitutionally applied is the very issue in this case.

CONCLUSION

For the foregoing additional reasons, petitioner respectfully requests that a writ of certiorari issue to the Court of Appeal of the State of California.

Respectfully submitted,

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[Appendix Follows]

APPENDIX

APPENDIX A

THERE IS NO CONSTITUTIONAL IMPEDIMENT TO THE APPLICATION OF CIVIL CODE SECTION 4803 IN THE PRESENT CASE.

In *Estate of Thornton* (1934) 1 Cal.2d 1, the Supreme Court held unconstitutional the Legislature's attempt to turn property which spouses domiciled in California had acquired while living in a common law jurisdiction, into community property when they crossed the border into California. The *Thornton* court based its decision on the then California constitutional doctrine that any changes in community property law that decreased the husband's right of dominion over the property disturbed his vested rights and therefore could only apply to subsequent acquisitions. (*Id.*, at p. 3; *Spreckels v. Spreckels* (1897) 116 Cal. 339). The *Thornton* court stated:

> "So long as we are bound by the holding that to limit the right of one spouse by increasing the right of the other in property acquired by their united labors, is the disturbance of a vested right, we entertain no doubt of the application of at least two provisions of the Fourteenth Amendment of the Constitution of the United States. If the right of the husband, a citizen of California, as to his separate property, is a vested one and may not be impaired or taken by California law, then to disturb in the same manner the same property right of a citizen of another state, bringing his property with him, is clearly to abridge the privileges and immunities of the citizen. Again, to take the property of "A" and transfer it to "B" because of his citizenship and domicile, is also to take his property without due process of law. This is true regardless of the place of acquisition or the state of his residence." (1 Cal.2d at p. 5).

Professor Barbara Armstrong, the leading California commentator on community property law, said of this decision:

> "In brief, the court felt bound by the often repeated holding that the control of rights in both community and separate property of spouses who acquired property while domiciled here, remain untouched by subsequent statutory changes in such controls. The court felt, therefore, that it could not thwart legislation that reached a contrary conclusion as to property brought into this state after being accumulated in a common law state." ("'Prospective' Application of Changes to Community Control—Rule of Property or Constitutional Necessity?," Barbara N. Armstrong (1945) 33 Cal.L.Rev. 476, 503).

In commenting on the *Thornton* decision Herma Hill Kay (then Herma Hill Schreter) recognized that it depended upon *Spreckels* and urged that "these two impediments to the reform of community property law in California may be ended simultaneously in a proper case." (Herma Hill Schreter, "Quasi-Community Property' in the Conflict of Laws" (1962) 50 Cal.L.Rev. 206, 210-226, 225-226).

Twelve years later the Supreme Court, on the same rationale, decided that because the rents, issues and profits and property retained the same character as the property itself, the husband's power over them could not be diminished retroactively either. (*Boyd v. Oser* (1944) 23 Cal.2d 613). However, in this decision were planted the seeds of change. In his concurring opinion Justice Traynor stated that in his opinion the constitutional theory that statutes changing the rights of husbands and wives in community property could have no retroactive application was unsound. (23 Cal.2d at pp. 623-624). This concurring opinion was lauded by Professor Armstrong who wrote:

> "The previous law review comment in 27 Cal.L.Rev. 49, cited in Justice Traynor's concurring opinion, persuasively argues the unsoundness of this constitutional doctrine. The amplification of argument, which this article involves, has seemed useful because of its great importance and also, as this is a memorial issue of the Review, because of Dean McMurray's strong conviction of its importance." (Armstrong, *Op.Cit., supra,* 33 Cal. L.Rev. at p. 376, fn. 1).

She continued by urging that "an early adoption by the Supreme Court of the special concurring opinion rendered in *Boyd v. Oser* would seem both logical and desirable." (33 Cal.L.Rev. at p. 405). Her theory was that so-called "vested rights" could constitutionally be impaired by a change in the law which was sufficiently necessary to preserve the public welfare. (33 Cal.L.Rev. at pp. 395-396).

Subsequently, the Supreme Court in *Addison v. Addison* accepted the reasoning of then Chief Justice Traynor's concurring opinion in *Boyd v. Oser* and the theory urged by Professor Armstrong. (*Addison v. Addison* (1965) 62 Cal.2d 558). In upholding the constitutionality of Civil Code section 4803, the *Addison* court also repudiated the *Thornton* decision as follows:

> "The constitutional doctrine announced in *Estate of Thornton, supra,* has been questioned. Justice (now Chief Justice) Traynor, in his concurring opinion in *Boyd v. Oser,* 23 Cal.2d 613, had the following to say, at p. 623:
>
> > 'The decision that existing statutes changing the rights of husbands and wives in community property

> can have no retroactive application have become a rule of property in this state and should not now be overruled. It is my opinion, however, that the constitutional theory on which they are based is unsound. [Citations.] That theory has not become a rule of property and should not invalidate future legislation in this field intended by the Legislature to operate retroactively.'
>
> "The underlying theory of *Thornton* has also been questioned by several legal authorities in this field. (Armstrong, "Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity? (1945) 33 Cal.L.Rev. 476; Schreter, "Quasi-Community Property" in the Conflict of Laws (1962) 50 Cal.L.Rev. 206; Comment, Community and Separate Property; Constitutionality of Legislation Decreasing Husband's Power of Control over Property Already Acquired (1938) 27 Cal.L.Rev. 49, 51-55; see also Comment (1927) 15 Cal.L.Rev. 399.)"
>
> "Thus, the correctness of the rule of *Thornton* is open to challenge." (62 Cal.2d at pp. 565-566).

The *Addison* Court, however, was not required specifically to overrule *Thornton* because it was not controlling in *Addison*. (62 Cal.2d at p. 566). *Addison* was heralded as "a milestone in California Supreme Court history. It makes the first hole in the wall of rigid doctrine which stood unscarred since 1897 and which blocked the way of orderly progress toward equitable property arrangements for California spouses." (Brigitte M. Bodenheimer, "Justice Peters' Contribution to Family and Community Property Law " (1969) 57 Cal.L.Rev. 577, 577).

The next major step in the abolition of the antiquated, inappropriate and unfair doctrines lingering from *Spreckels* and *Thornton* was taken two years ago by the California Supreme Court in *In re the Marriage of Bouquet* (1976) 16 Cal.3d 583. At issue in *Bouquet* was a 1971 amendment to Civil Code section 5118 which made the earnings and accumulations of both spouses while living apart their respective separate property. Under prior law, only those of the wife were separate property while the husband's remained community property. The trial court had held that only earnings and accumulations acquired after the March 4, 1972, effective date of the amendment could constitutionally be the husband's separate property. The Supreme Court reversed. It found that the Legislature had intended the statute to operate retroactively and it held that retroactive application was not unconstitutional.

The *Bouquet* Court acknowledged and recognized that the husband's earnings acquired prior to the effective date of the statute would clearly have originally been classified as community property in which the wife had gained substantial rights. The court also acknowledged and recognized that the retroactive application of this change in the law would deprive the wife of her vested right to her half share of the income her husband had accumulated in that period. Notwithstanding these facts, the court upheld retroactive application of the amendment. (16 Cal.3d at pp. 591-592). It did so by expanding the reasoning of the *Addison* opinion and Professor Armstrong's Law Review article. (16 Cal.3d at pp. 593-594).

With *Bouquet*, the Supreme Court has finally made clear once and for all that legislative enactments governing marital property are not to be frustrated by the application of outdated constitutional doctrine. (16 Cal.3d at pp. 593-594, esp. fn. 10). In the present case, therefore, the court was in error in not simply applying Civil Code section 4803 in accordance with its clear language which dictates a finding that all of the parties' marital assets were quasi-community property. In light of the foregoing, this court was therefore incorrect in having relied on *Thornton* in any way and in having limited Addison to its facts.